

OFFICIAL CODE OF GEORGIA ANNOTATED

2012 Supplement

Including Acts of the 2012 Session of the General Assembly

Prepared by

The Code Revision Commission
The Office of Legislative Counsel
and
The Editorial Staff of LexisNexis™



Published Under Authority of the State of Georgia

Volume 15 2008 Edition

Title 17. Criminal Procedure

Including Notes to the Georgia Reports and the
Georgia Appeals Reports

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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2012 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to-LexisNexis® through March 30, 2012. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 30, 2012.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2012 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2012 supplement pamphlets and in the bound volumes of the Code.

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TITLE 17

CRIMINAL PROCEDURE

Chap.

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4. Arrest of Persons, 17-4-1 through 17-4-62.
5. Searches and Seizures, 17-5-1 through 17-5-100.
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18. Written Statements of Information to Victims of Rape or Forcible Sodomy, 17-18-1 through 17-18-2.

Law reviews. — For article, “Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution,” see 26 Ga. St. U. L. Rev. 417 (2010). For article, “The Political Economy of Criminal Procedure Litigation,” see 45 Ga. L. Rev. 721 (2011).

For note, “Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony,” see 46 Ga. L. Rev. 213 (2011).

CHAPTER 1

GENERAL PROVISIONS

17-1-4. Vacation of judgments, verdicts, rules, or orders obtained by perjury.

JUDICIAL DECISIONS

ANALYSIS

PERJURY CONVICTION

Perjury Conviction

Perjury conviction not sufficient justification where judgment obtainable without perjured evidence.

Defendant's convictions were not obtained by the use of perjured testimony because there was no showing that any perjury actually occurred or that the witness was ever charged with or convicted of

perjury; even assuming that the witness committed perjury, the guilty verdicts and consequent judgments could have been obtained without such evidence because there was testimony from other witnesses at the crime scene portraying the defendant's unjustified shooting of the victim. *Nations v. State*, 290 Ga. 39, 717 S.E.2d 634 (2011).

CHAPTER 2

JURISDICTION AND VENUE

17-2-1. Jurisdiction over crimes and persons charged with commission of crimes generally.

JUDICIAL DECISIONS

Jurisdiction held established by record.

Under O.C.G.A. § 17-2-1(b)(1), Georgia had subject matter jurisdiction over a kidnapping case even though the victim was killed in South Carolina. As the victim was abducted in Georgia, the kidnapping occurred there; when the victim was later injured in South Carolina, it was nevertheless a bodily injury for purposes of the Georgia kidnapping. *Hunsberger v. State*, 299 Ga. App. 593, 683 S.E.2d 150 (2009).

Venue established by defendant's residence from which crime committed.

— Because a police officer testified that defendant sold methamphetamine from defendant's residence, the state met the state's burden of proving beyond a reasonable doubt that venue of the crimes charged was properly in the county in which defendant was tried; therefore, the trial court properly denied defendant's motion for a new trial. *Borders v. State*, 299 Ga. App. 100, 682 S.E.2d 148 (2009).

17-2-2. Venue generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION PROOF OF VENUE

General Consideration

Section provides proper jurisdiction where location of crime unclear.

Under O.C.G.A. § 16-13-30(j)(1), it was unlawful for any person to possess marijuana, and since the marijuana was found in defendant's pocket when the defendant was arrested, and defendant was observed traveling in Newton County before defendant's arrest in Rockdale County, the evidence was sufficient to conclude beyond a reasonable doubt that defendant was guilty of possession of less than one ounce of marijuana since O.C.G.A. § 17-2-2(e) provided that if a crime was committed upon any vehicle traveling within the state and it cannot readily be determined in which county the crime was committed, the crime shall be considered as having been committed in any county in which the crime could have been committed through which the vehicle has traveled. *Johnson v. State*, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

Venue of crime is jurisdictional fact.

After a defendant was granted a directed verdict on the basis that the state failed to prove venue in a criminal prosecution for driving under the influence per se, retrial was not barred under U.S. Const. amend. V and O.C.G.A. § 16-1-8 because, while venue had to be laid in the county in which the crime was allegedly committed under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2 and venue was a jurisdictional fact, failure to prove venue was a procedural error that implied nothing as to defendant's guilt or innocence. *Hudson v. State*, 296 Ga. App. 758, 675 S.E.2d 603, cert. denied, No. S09C1163, 2009 Ga. LEXIS 413 (Ga. 2009); cert. denied, U.S. , 130 S. Ct. 799, 175 L. Ed. 2d 559 (2009).

Venue in cases of kidnapping.

Because the evidence was sufficient to

support a finding that a kidnapping might have been committed in Douglas County, there was no ground for reversal. A police officer testified that a bar and all the buildings surrounding the bar, from which a victim was abducted, were in Douglas County, although the bar was situated near the county line with Cobb County; while the victim was driven to an ATM in Cobb County, there was no evidence of the route taken between the bar and that ATM. *Epps v. State*, 297 Ga. App. 66, 676 S.E.2d 791 (2009).

Because a defendant forced the victim to drive to an abandoned house and then drove the victim through other neighborhoods before forcing the victim out of the car and refusing to return the victim's personal belongings, the defendant's convictions for kidnapping and robbery by intimidation under O.C.G.A. §§ 16-5-40(a) and 16-8-40 did not merge; pursuant to O.C.G.A. § 17-2-2(e), venue was proper in any county through which the vehicle traveled. *Aldridge v. State*, 310 Ga. App. 502, 713 S.E.2d 682 (2011).

Venue in robbery case.

Court of appeals erred in reversing the defendant's conviction for armed robbery because the trial court properly declined to instruct the jury on the lesser included offense of theft by taking since there was no evidence that the included crime was committed in the county in which the defendant was being tried; although the state was unwilling to allow the defendant to waive venue or stipulate that what occurred was a theft by taking that happened entirely in Clayton County, the defendant was free to present evidence and argue to the jury that while the defendant was guilty of committing theft by taking in Clayton County, the defendant was not guilty of armed robbery in DeKalb County. But the defendant could not require the state to agree that the defendant commit-

ted theft by taking in Clayton County or require the trial court to instruct the jury on a lesser included offense over which the court lacked venue. *State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010).

Venue for the crime of making a false statement.

Trial court committed reversible error as a result of convicting a defendant for making false statements to a state or local government agency or department in a case wherein the state failed to prove venue in the jurisdiction that the defendant was tried. The state was obligated to prove that the defendant's false statements to Federal Bureau of Investigation officers occurred in Fulton County wherein the defendant was tried; thus, the defendant's conviction required reversal. *Tesler v. State*, 295 Ga. App. 569, 672 S.E.2d 522 (2009), cert. denied, No. S09C0810, 2009 Ga. LEXIS 334 (Ga. 2009).

Failure to instruct on venue.

Because the trial court properly instructed the jury that venue was a jurisdictional fact that had to be proven beyond a reasonable doubt as to each crime charged in the indictment, no reversible error resulted from the same. *Clark v. State*, 283 Ga. 234, 657 S.E.2d 872 (2008).

Trial court's jury charge on venue was not burden-shifting because the trial court charged the jury that it was the duty of the state to prove the material allegations of the indictment and the guilt of the defendant sufficiently to convince the jury's mind beyond a reasonable doubt of the defendant's guilt; the trial court also clearly instructed on the defendant's presumption of innocence and informed the jury that the instruction had to be construed in the instruction's entirety. *Owens v. State*, 286 Ga. 821, cert. denied, U.S. , 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010).

Cited in *Rogers v. State*, 298 Ga. App. 895, 681 S.E.2d 693 (2009); *Miller v. State*, 289 Ga. 854, 717 S.E.2d 179 (2011).

Proof of Venue

Testimony that crime committed in certain county proves committed within state.

Defendant was arrested for obstruction

of a police officer for refusing to obey an officer's order to move the defendant's vehicle which was stopped on a public road. The officer's testimony that the road was located in Dawson County was sufficient to prove venue in Dawson County beyond a reasonable doubt. *West v. State*, 296 Ga. App. 58, 673 S.E.2d 558 (2009).

Venue proved where evidence indicates crime committed in trial county.

With regard to a defendant's conviction for child molestation, the victim's testimony that the victim lived in a particular city, which was located in Spalding County, and that the incident occurred at another apartment, which the evidence revealed through the testimony was also located in that particular city, there was sufficient evidence to prove venue in Spalding County beyond a reasonable doubt. *Mahone v. State*, 293 Ga. App. 790, 668 S.E.2d 303 (2008).

State did not fail to prove venue beyond a reasonable doubt because the proof was that the crime was committed in the County of Clayton; that the trial court was sitting in the County of Clayton and the State of Georgia was a fact known to the trial court from the court's own records and the public law, and when therefore it was proven that the crime was committed in the County of Clayton it was proven that the crime was committed in the county in which the trial court entertained jurisdiction over it. *Gresham v. State*, 289 Ga. 103, 709 S.E.2d 780 (2011).

Proving venue in child molestation cases.

Although defendant argued that the state failed to prove venue beyond a reasonable doubt, pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a) generally, a criminal case had to be tried in the county in which the crime was committed. The state had the burden of proving venue, which the state could do using either direct or circumstantial evidence, and whether the evidence as to venue satisfied the reasonable-doubt standard was a question for the jury, and the state's decision will not be set aside if there is any evidence to support the decision; therefore, because in defendant's case, the victim testified that

defendant molested the victim in their residence and that the residence was located in Grady County, Georgia, venue was established beyond a reasonable doubt. *Bynum v. State*, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010).

Evidence insufficient to establish venue.

Defendant's convictions for rape and related crimes involving one out of six victims was reversed on appeal as the state failed to prove that the crimes against that victim occurred in Fulton County, Georgia, where the trial was held as the victim stated that the victim was using a pay phone on a certain street at a certain location at the time the victim was abducted, but the state never put forth any evidence establishing that the street at issue was in Fulton County. Further, there was no evidence offered by the state to establish the location of the school the victim had met the police at after the crime. *Baker v. State*, 295 Ga. App. 162, 671 S.E.2d 206 (2008), cert. denied, No. S09C0571, 2009 Ga. LEXIS 183 (Ga. 2009).

State's failure to prove beyond a reasonable doubt that the defendant and the codefendant possessed a pipe with traces of methamphetamine on it, which was discovered in a search of the defendant's impounded vehicle in the county, rendered the verdict contrary to law, without a sufficient evidentiary basis, because venue was an essential element of the crime, and there was no direct evidence of possession of the pipe in the county; because there was no evidence placing the pipe in the vehicle while the vehicle was in the county, and there was a possibility that the pipe was put in the vehicle after the shootings during one of several stops the defendant and the codefendant made while in Alabama, venue for possession of methamphetamine was not proven to be in the county. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

State failed to prove venue beyond a reasonable doubt because evidence that the defendant's drugs sales to an informant occurred somewhere in Vidalia, Georgia, was insufficient to establish that

the crimes occurred in Toombs County since the habeas court properly took judicial notice that Vidalia was located in two different counties, Toombs and Montgomery, and O.C.G.A. § 17-2-2(e) was inapplicable; because the informant would have known the general locations where the sales occurred and because the drug task force agents knew the exact route that the informant and the defendant traveled, the state could have readily determined whether the drug sales occurred in Toombs County and offered evidence to the jury on that essential point. *Thompson v. Brown*, 288 Ga. 855, 708 S.E.2d 270 (2011).

Evidence sufficient to establish venue.

With regard to defendant's convictions on two counts of cruelty to children in the first degree and one count of aggravated battery, the state proved venue in Cobb County, Georgia, based on defendant being indicted in Cobb County for crimes committed sometime between July 1, 2002, and December 22, 2002; the evidence presented at trial established that defendant lived with the victim's parent and the victim at an apartment located in Cobb County during that time; the manager of the apartment complex saw the victim at the apartment on a daily basis and knew that the victim lived in the apartment with defendant; defendant admitted to whipping the victim on a daily basis; and the manager saw the victim in the apartment with injuries. *Glover v. State*, 292 Ga. App. 22, 663 S.E.2d 772 (2008).

As there was evidence from the defendant's confession to police and testimony from bank employees, together with physical evidence, that the defendant wrote a check out from a victim's checkbook in the defendant's name and then cashed the check at the bank, there was sufficient evidence to support a conviction for forgery in violation of O.C.G.A. § 16-9-1(a); the element of venue was properly established by the evidence as well pursuant to O.C.G.A. § 17-2-2(a). *Bell v. State*, 284 Ga. 790, 671 S.E.2d 815 (2009).

Jury's determination that venue was proper in Fulton County was supported by the record, and thus, the trial court's de-

nial of the defendant's motion for directed verdict was not erroneous under circumstances in which the victim was abducted at a mall in Fulton County, the victim stated that the defendant originally got on a northbound interstate, but that the victim had no idea where the victim and defendant went from there, they drove around for about 20 minutes, the victim was wearing blacked-out sunglasses and could not see, and eventually the victim was taken from the vehicle into an unknown location and raped; the most definite testimony regarding the location of the crimes related to the mall, which was shown to be located in Fulton County, and the jury was authorized to find beyond a reasonable doubt that the rape might have occurred in Fulton County. *Leftwich v. State*, 299 Ga. App. 392, 682 S.E.2d 614 (2009), cert. denied, No. S09C2013, 2009 Ga. LEXIS 710 (Ga. 2009); cert. denied, U.S. , 130 S. Ct. 1913, 176 L. Ed. 2d 386 (2010).

Evidence that a police officer found the victim lying on a sidewalk in Fulton County was sufficient to establish venue in that county under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a). *Branford v. State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

Venue with regard to convictions for possession of methamphetamine and of the less than an ounce of marijuana was established as being in the county where the drugs were discovered during a search of the defendant's impounded vehicle because although the State presented no evidence that the methamphetamine residue and the marijuana found in the vehicle were in the possession of the defendant and the codefendant while they were in the county. On cross-examination, the defendant admitted to having hand-rolled a marijuana cigarette found in the vehicle the morning of the shooting; that testimony, coupled with the undisputed fact that the defendant, the codefendant, and the vehicle were at a service station in the county at a time following the point at which the defendant admitted having made the cigarette, established beyond a reasonable doubt that the defendant and codefendant possessed the marijuana cigarette in the county. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

Since a shooting victim was assaulted in a vehicle that was shown by an investigator's officer to have been traveling through Fulton County, the state proved beyond a reasonable doubt that venue was proper in Fulton County. *Saxton v. State*, 300 Ga. App. 535, 685 S.E.2d 780 (2009).

State met the state's burden of proving beyond a reasonable doubt that venue of the crime charged was properly in Fulton County because, although the victim did not know the exact location of the shooting, the logical import of the victim's testimony was that the crime scene itself was in Fulton County; the victim testified to driving from one street to what the victim thought was another street where the defendant shot the victim, and the state established that the first street was in Fulton County. *Sewell v. State*, 302 Ga. App. 151, 690 S.E.2d 634, cert. denied, No. S10C0856, 2010 Ga. LEXIS 530 (Ga. 2010).

State's proof of venue was sufficient because the uncontradicted evidence at trial was that the victim was shot and buried on a hunting property in Echols County. *Cantera v. State*, 304 Ga. App. 289, 696 S.E.2d 354 (2010).

State established venue under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. §§ 16-9-125 and 17-2-2(a) because a reasonable trier of fact was authorized to find beyond a reasonable doubt that the victims resided or were found in Forsyth County at the time the offense of financial identity fraud was committed as alleged in the indictment; the victim testified that the victim had been a resident of Forsyth County for twelve years and that the victim's company had been located there for seventeen years. *Zachery v. State*, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

In an aggravated battery and gang activity case in which the crimes occurred at a bus stop outside Six Flags Over Georgia amusement park, there was sufficient evidence to establish venue in Cobb County because one defendant testified that the fight was "on Cobb County's side of the bus..." and other witnesses indicated on an exhibit the location where the witnesses exited the park and testified that the witnesses were at the Cobb County

Transit bus stop. *Morey v. State*, 312 Ga. App. 678, 719 S.E.2d 504 (2011).

State met the state's burden of proving beyond a reasonable doubt that venue of the crime charged was properly in Troup County, Georgia because the testimony of the victim's grandmother first established the exact location of the crime scene, and the victim testified that the events on the night in question took place in that county; the defendant offered no evidence to the contrary. *Strozier v. State*, 314 Ga. App. 432, 724 S.E.2d 446 (2012).

Pursuant to O.C.G.A. § 17-2-2(h), the state adequately proved venue was in DeKalb County as to a murder victim whose body was never found because the victim was last seen alive in that county, the defendant confessed that the defendant shot the victim in Atlanta, which was partly in DeKalb County, and the defendant and the victim had been together every day at the defendant's residence in that county. *Rogers v. State*, 290 Ga. 401, 721 S.E.2d 864 (2012).

Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 on the ground that venue did not lie in Laurens County because there was some evidence that the place of payment was at the seller's location in Laurens County and that the defendant wrongfully failed or refused to pay the seller in Laurens County for the cattle; even if the defendant's fraudulent intent arose in Kansas sometime after the cattle were shipped, the crime was not consummated until the defendant failed or refused to pay. *Babbitt v. State*, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

Testimony sufficient to support evidence regarding venue.

In defendants' trial for fleeing a police officer, reckless driving, and speeding, in Newton County, because a state trooper testified that the trooper first encountered

defendants in Newton County and described the route using a map of Newton County. The trooper testified that no part of the pursuit took place off the map. Even had the route of pursuit taken the parties across county lines out of Newton County, venue would still be properly founded in Newton County pursuant to O.C.G.A. § 17-2-2(e) or (h), which allowed venue wherever a portion of the crime took place or wherever the evidence showed the crime took place. *Brewster v. State*, 300 Ga. App. 143, 684 S.E.2d 309 (2009).

Venue established by subsection (h).

For venue purposes, evidence that showed that a murder victim's blood was found in a motel room in Floyd County, along with the fact that the victim was last seen alive in Floyd County, was sufficient under O.C.G.A. § 17-2-2(h) to allow a jury to consider that the murder might have been committed in Floyd County beyond a reasonable doubt. *Edmond v. State*, 283 Ga. 507, 661 S.E.2d 520 (2008).

Because the presence of methamphetamine in defendant's urine constituted circumstantial evidence that defendant knowingly possessed the drug within three days prior to a urine test, and because the state did not have to prove where the drug was actually ingested, the evidence was sufficient to support defendant's conviction and venue under O.C.G.A. § 17-2-2(h). *Harbin v. State*, 297 Ga. App. 877, 678 S.E.2d 553 (2009).

Jury instruction was not improper. — Although the better practice was to give a jury instruction on venue that indicated that a jury "may consider" whether a crime was committed in any county in which the evidence showed beyond a reasonable doubt that the crime might have been committed, a jury instruction that instead mirrored the language of O.C.G.A. § 17-2-2 was not erroneous and did not improperly shift the burden of proof regarding venue to the defendant in a murder case. *Edmond v. State*, 283 Ga. 507, 661 S.E.2d 520 (2008).

17-2-4. Defendant arrested, held, or present in county other than that in which indictment or accusation is pending.

JUDICIAL DECISIONS

State not required to stipulate to venue. — Venue is not a fact to which the state is required to stipulate whenever the defendant wishes to do so, particularly when the state disbelieves the defendant’s account of that fact, because stipulations and waivers of jurisdictional defenses streamline a proceeding in which both parties agree on a fact, making further proof unnecessary; stipulations and jurisdictional waivers are not a means of forcing an opposing party to agree to facts it believes are not true and would mislead the factfinder. If the facts are disputed, the parties’ competing evidence and arguments can be presented to the factfinder to resolve. *State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010).

Trial court not required to instruct jury on lesser included offense over which it lacks venue. — Court of appeals erred in reversing the defendant’s conviction for armed robbery because the

trial court properly declined to instruct the jury on the lesser included offense of theft by taking since there was no evidence that the included crime was committed in the county in which the defendant was being tried; although the state was unwilling to allow the defendant to waive venue or stipulate that what occurred was a theft by taking that happened entirely in Clayton County, the defendant was free to present evidence and argue to the jury that while the defendant was guilty of committing theft by taking in Clayton County, the defendant was not guilty of armed robbery in DeKalb County. But the defendant could not require the state to agree that the defendant committed theft by taking in Clayton County or require the trial court to instruct the jury on a lesser included offense over which it lacked venue. *State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010).

CHAPTER 3

LIMITATIONS ON PROSECUTION

Sec.		Sec.	
17-3-1.	Limitation on prosecutions — Generally.		Exclusions for certain offenses involving a victim under 16 years of age.
17-3-2.1.	Limitation on prosecution —		

17-3-1. Limitation on prosecutions — Generally.

- (a) A prosecution for murder may be commenced at any time.
- (b) Except as otherwise provided in Code Section 17-3-2.1, prosecution for other crimes punishable by death or life imprisonment shall be commenced within seven years after the commission of the crime except as provided by subsection (d) of this Code section; provided, however, that prosecution for the crime of forcible rape shall be commenced within 15 years after the commission of the crime.
- (c) Except as otherwise provided in Code Section 17-3-2.1, prosecution for felonies other than those specified in subsections (a), (b), and (d)

of this Code section shall be commenced within four years after the commission of the crime, provided that prosecution for felonies committed against victims who are at the time of the commission of the offense under the age of 18 years shall be commenced within seven years after the commission of the crime.

(d) A prosecution for the following offenses may be commenced at any time when deoxyribonucleic acid (DNA) evidence is used to establish the identity of the accused:

- (1) Armed robbery, as defined in Code Section 16-8-41;
- (2) Kidnapping, as defined in Code Section 16-5-40;
- (3) Rape, as defined in Code Section 16-6-1;
- (4) Aggravated child molestation, as defined in Code Section 16-6-4;
- (5) Aggravated sodomy, as defined in Code Section 16-6-2; or
- (6) Aggravated sexual battery, as defined in Code Section 16-6-22.2;

provided, however, that a sufficient portion of the physical evidence tested for DNA is preserved and available for testing by the accused and provided, further, that if the DNA evidence does not establish the identity of the accused, the limitation on prosecution shall be as provided in subsections (b) and (c) of this Code section.

(e) Prosecution for misdemeanors shall be commenced within two years after the commission of the crime. (Code 1933, § 26-502, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1987, p. 330, § 1; Ga. L. 1996, p. 1115, § 4; Ga. L. 2002, p. 650, § 1; Ga. L. 2012, p. 899, § 4-1/HB 1176.)

The 2012 amendment, effective July 1, 2012, substituted “shall” for “must” throughout this Code section; in subsection (b), substituted “Except as otherwise provided in Code Section 17-3-2.1, prosecution” for “Prosecution” and substituted “subsection (d)” for “subsection (c.1)”; in subsection (c), substituted “Except as otherwise provided in Code Section 17-3-2.1, prosecution” for “Prosecution” and substituted “and (d)” for “and (c.1)”; and redesignated former subsections (c.1) and (d) as present subsections (d) and (e), respectively. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

When period begins to run.

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion for a new trial on the ground that the applicable statute of limitations ran on the rape offenses before the defendant was charged because in applying the 1996 amendment to O.C.G.A. § 17-3-1 and the tolling provisions of O.C.G.A. § 17-3-2.1, the limitation period for the defendant's crime ran 15 years from December 13, 1995, when the crimes were first reported to authorities. Thus, because the state had until December 13, 2010 to indict the defendant, the January 7, 2008, indictment was timely and no ex post facto violation arose because the original seven-year limitation period had not expired at the time. *Flournoy v. State*, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

Prosecution not time barred when intending to prove exception. — Defendant's argument that the trial court erred in determining that a superceding indictment served to toll the statutes of limitations as to Counts 2, 4, and 5 because the tolling language in those defectively referred back to Count 1, rather than the count in question, was meritless because the defendant was sufficiently apprised of all the essential elements of the charges when read as a whole, including the fact that the state intended to prove that the statutes of limitations for the crimes were tolled until 2005 pursuant to O.C.G.A. §§ 17-3-1(c.1) and 17-3-2(2) due to the fact that the defendant's identity was unknown until that time; the superfluous language "as to count one (1)" contained in Counts 2 through 6 was not enough to confuse the defendant about the offenses or the applicable exception to the statutes of limitations, which the state intended to prove at trial. Because the state was alleging an exception to the statutes of limitations, it was not barred from proceeding against the defendant under the superceding indictment. *Leftwich v. State*, 299 Ga. App. 392, 682 S.E.2d 614 (2009), cert. denied, No.

S09C2013, 2009 Ga. LEXIS 710 (Ga. 2009); cert. denied, U.S. , 130 S. Ct. 1913, 176 L. Ed. 2d 386 (2010).

State need only prove date within period of limitations.

With regard to defendant's conviction for burglary, the trial court did not err in allowing evidence of an April 30, 2003, burglary based on the date range of April 18 to 22, 2003, being set forth in the indictment because the date of the burglary was not an essential element of the burglary offense charged, and defendant did not assert a defense — alibi or otherwise — making the date material. Because the burglary of April 30, 2003, was within the applicable four-year statute of limitation, the trial court did not err in allowing evidence of it. *McDaniel v. State*, 289 Ga. App. 722, 658 S.E.2d 248 (2008).

Trial court, not jury, required to make factual findings raised in pre-trial plea in bar alleging statute of limitations defense. — Trial court erred in reserving for the jury resolution of defendants' pleas in bar, alleging a statute of limitations defense under O.C.G.A. § 17-3-1(c) to indictments charging thefts by taking and receiving in connection with a client's property transfers, because the trial court, and not the jury, was required to make factual findings based on evidence received during a pretrial hearing on this matter. *Rader v. State*, 300 Ga. App. 411, 685 S.E.2d 405 (2009).

Crime committed prior to indictment.

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal on the ground that there was insufficient evidence that the crimes for which the defendant was charged, aggravated assault, making terroristic threats, and cruelty to children in the third degree, were committed on the date alleged in the indictment because there was sufficient evidence to support the allegations of the indictment; the exact date of the crimes was not a material allegation of the indictment because the exact date was not an essential element with respect to any of the charged offenses, and the date of the

crimes proved at trial was prior to the return of the indictment and within the limitation periods for the crimes. *Coats v. State*, 303 Ga. App. 818, 695 S.E.2d 285 (2010).

Seven year statute of limitations.

Trial court erred in dismissing the counts of the indictment charging the defendant with aggravated child molestation, child molestation, and statutory rape with a child under the age of 16 because the indictment sufficiently invoked the tolling provision of O.C.G.A. § 17-3-2.1; pursuant to O.C.G.A. § 17-3-1(c), the state had seven years to indict the defendant, and the defendant was indicted within seven years. *State v. Godfrey*, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Trial court did not err in granting the defendant's plea in bar to dismiss the counts of an indictment charging the defendant with child molestation and aggravated child molestation to a child under the age of 14 because the state failed to indict the defendant within the limitation period, O.C.G.A. § 17-3-1(c); because the state did not allege that the victim was under the age of 16, the tolling provision of O.C.G.A. § 17-3-2.1 was not invoked. *State v. Godfrey*, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion to dismiss an indictment charging the defendant with armed robbery, O.C.G.A. § 16-8-41, for a violation of the defendant's right to due process because the defendant failed to show that the defense was prejudiced by the six year delay between the commission of the crime and the defendant's arrest or that the state deliberately delayed the arrest to obtain a tactical advantage; the defendant was arrested and indicted for armed robbery, a noncapital felony, within the applicable seven-year statute of limitation, O.C.G.A. §§ 16-8-41(a) and 17-3-1(c). *Billingslea v. State*, 311 Ga. App. 490, 716 S.E.2d 555 (2011).

Four year statute of limitations.

Defendant was properly denied a motion for a directed verdict of acquittal based on the expiration of the statute of limitations under O.C.G.A. § 17-3-1 as the charge of theft by deception was a

felony rather than a misdemeanor under O.C.G.A. § 16-8-12 based on the evidence that more than \$500 was taken and, thus, a four-year statute of limitations applied; the defendant should have made a special plea in bar prior to the trial. *Parks v. State*, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

Trial court did not err in granting the defendant's plea in bar based upon the running of the statute of limitations, O.C.G.A. § 17-3-1(c) because no valid indictment was filed within four years of the date the alleged victim learned of the defendant's actions when the first indictment against the defendant alleged only one crime and did not inform the defendant of all the charges the defendant had to defend against at trial and was not specific enough to protect the defendant from multiple prosecutions; the state could not allege a single defective charge of theft by taking that could have been barred by the statute of limitation and upon its dismissal inflate that single, defective one count indictment to one alleging 31-counts, and the second indictment would impermissibly broaden and substantially amend the first indictment. *State v. Bair*, 303 Ga. App. 183, 692 S.E.2d 806 (2010).

State must commence prosecutions for theft by taking within four years of the commission of the crimes because the four-year limitation period does not include any period in which the crimes were unknown by the state, but the knowledge of someone injured by the crime may be imputed to the state for purposes of determining if the exception to the statute applies; when the state seeks to rely on an exception to the statute, it must allege the exception in the indictment *State v. Bair*, 303 Ga. App. 183, 692 S.E.2d 806 (2010).

Defendant's prosecution for the crimes of false imprisonment, O.C.G.A. § 16-5-41, and kidnapping, O.C.G.A. § 16-5-40(a), were barred by the statute of limitations, O.C.G.A. § 17-3-1, because the state did not indict the defendant on those charges until after the four-year statute of limitations ran; the state's decision to reissue the indictment to include the false imprisonment and kidnapping counts substantially amended the original

charges because those offenses contained elements separate and distinct from any of the crimes charged in the original indictment. *Martinez v. State*, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

Indictment filed within 15 year statute of limitations. — With regard to a defendant's conviction for forcible rape of the defendant's child during the time the child was 13 through 15 years of age, the trial court correctly concluded that the state had 15 years from the victim's 16th birthday on January 12, 1995, or until January 12, 2010, to prosecute the case; therefore, no *ex post facto* violation occurred since the indictment was filed on January 8, 2008. *Duke v. State*, 298 Ga. App. 719, 681 S.E.2d 174 (2009), cert. denied, No. S09C1866, 2010 Ga. LEXIS 31 (Ga. 2010).

Two year statute of limitations. — Prosecution of a defendant for speeding and driving with a suspended tag was not barred by the limitations period contained in O.C.G.A. § 17-3-1(d) because the prosecution was commenced under the Uniform Traffic Citations within the two-year period following the commission of the traffic offenses. *Chism v. State*, 295 Ga. App. 776, 674 S.E.2d 328 (2009).

State could prosecute a count of the indictment under an amended accusation because the indictment was amended before the expiration of the two-year statute of limitation, O.C.G.A. § 17-3-1(d). *Sevostyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012).

Allegation of molestation of a child under 16 sufficient to invoke tolling. — Indictment alleging the molestation of a child under the age of 16 sufficiently invoked the statute of limitation tolling provision set forth in O.C.G.A. § 17-3-2.1. *Lyde v. State*, 311 Ga. App. 512, 716 S.E.2d 572 (2011).

State failed to prove a tolling of the statute of limitation.

The state argued that O.C.G.A. § 17-3-1(c), the four-year statute of limitation for conspiracy to defraud the state, O.C.G.A. § 16-10-21, and conspiracy in restraint of free and open competition, O.C.G.A. § 16-10-22, was tolled under O.C.G.A. § 17-3-2(2) until it learned of the conspiracy. The defendants' pleas in bar were properly granted as the evidence was sufficient to establish that a defendant's supervisor, a state employee, was aware of the crimes over four years before the defendants were indicted, and the supervisor's knowledge was imputed to the state. *State v. Robins*, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

The state argued that O.C.G.A. § 17-3-1, the statute of limitation for conspiracy charges, was tolled under O.C.G.A. § 17-3-2(2) until it learned of the conspiracy after receiving an open records request. The defendants' pleas in bar were properly granted, as the state had the burden to prove the date it received the open records request, but failed to do so. *State v. Robins*, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

Limitations period properly tolled.

As the evidence established that a defendant's employer first learned of the defendant's alleged false expense reports and improper payments to the defendant's spouse in an audit conducted less than four years before the state indicted the defendant for felony theft, O.C.G.A. § 17-3-1(c)'s four-year statute of limitations was tolled by O.C.G.A. § 17-3-2(2). The tolling period ended when the employer actually learned of the crime, not when the employer could have discovered the crime through the exercise of reasonable diligence. *State v. Campbell*, 295 Ga. App. 856, 673 S.E.2d 336 (2009), cert. denied, No. S09C0965, 2009 Ga. LEXIS 380 (Ga. 2009).

17-3-2. Limitation on prosecutions — Periods excluded.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

State had no actual knowledge of criminal wrongdoing. — Superior court did not err in failing to grant the defendant's plea in bar, motion to dismiss, and general demurrer to prohibit prosecution of the non-murder counts in the indictment as barred by the applicable statutes of limitation because the record did not support a finding that the state had actual knowledge that there was criminal wrongdoing resulting in the fatality, much less that the defendant would be charged as the perpetrator of the victim's death, until the superseding medical examiner's report. *Higgenbottom v. State*, 290 Ga. 198, 719 S.E.2d 482 (2011).

Statute of limitation not tolled.

The state argued that O.C.G.A. § 17-3-1(c), the four-year statute of limitation for conspiracy to defraud the state, O.C.G.A. § 16-10-21, and conspiracy in restraint of free and open competition, O.C.G.A. § 16-10-22, was tolled under O.C.G.A. § 17-3-2(2) until it learned of the conspiracy. The defendants' pleas in bar were properly granted as the evidence was sufficient to establish that a defendant's supervisor, a state employee, was aware of the crimes over four years before the defendants were indicted, and the supervisor's knowledge was imputed to the state. *State v. Robins*, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

The state argued that O.C.G.A. § 17-3-1, the statute of limitation for conspiracy charges, was tolled under O.C.G.A. § 17-3-2(2) until it learned of the conspiracy after receiving an open records request. The defendants' pleas in bar were properly granted, as the state had the burden to prove the date it received the open records request, but failed to do so. *State v. Robins*, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

Statute of limitation tolled.

As the evidence established that a defendant's employer first learned of the defendant's alleged false expense reports and improper payments to the defendant's spouse in an audit conducted less than four years before the state indicted the defendant for felony theft, O.C.G.A. § 17-3-1(c)'s four-year statute of limitations was tolled by O.C.G.A. § 17-3-2(2).

The tolling period ended when the employer actually learned of the crime, not when the employer could have discovered the crime through the exercise of reasonable diligence. *State v. Campbell*, 295 Ga. App. 856, 673 S.E.2d 336 (2009), cert. denied, No. S09C0965, 2009 Ga. LEXIS 380 (Ga. 2009).

Although an indictment was not issued until fourteen years after the crimes of rape, kidnapping, and false imprisonment were committed, pursuant to O.C.G.A. § 17-3-2(2), the limitation periods for the crimes were tolled because the defendant's identity as the perpetrator was not known either to the victim or to the state until just before the indictment was issued. *Scales v. State*, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

Limitations period properly tolled.

— State met the state's burden of proving the applicability of the tolling statute, O.C.G.A. § 17-3-2(2), because the state filed its indictment against the defendant less than four years after the victim had actual knowledge of the defendant's crime, insurance fraud in violation of O.C.G.A. § 17-3-1(c); the tolling period ended when an investigator obtained first-hand knowledge of the acts forming the crimes. *Royal v. State*, 314 Ga. App. 20, 723 S.E.2d 118 (2012).

Extension of statute of limitations.

Defendant's argument that the trial court erred in determining that a superseding indictment served to toll the statutes of limitations as to Counts 2, 4, and 5 because the tolling language in those defectively referred back to Count 1, rather than the count in question, was meritless because the defendant was sufficiently apprised of the all the essential elements of the charges when read as a whole, including the fact that the state intended to prove that the statutes of limitations for the crimes were tolled until 2005 pursuant to O.C.G.A. §§ 17-3-1(c.1) and 17-3-2(2) due to the fact that the defendant's identity was unknown until that time; the superfluous language "as to count one (1)" contained in Counts 2 through 6 was not enough to confuse the defendant about the offenses or the applicable exception to the statutes of limitations, which the state intended to prove at

trial. Because the state was alleging an exception to the statutes of limitations, it was not barred from proceeding against the defendant under the superceding indictment. *Leftwich v. State*, 299 Ga. App.

392, 682 S.E.2d 614 (2009), cert. denied, No. S09C2013, 2009 Ga. LEXIS 710 (Ga. 2009); cert. denied, U.S. , 130 S. Ct. 1913, 176 L. Ed. 2d 386 (2010).

17-3-2.1. Limitation on prosecution — Exclusions for certain offenses involving a victim under 16 years of age.

(a) For crimes committed during the period beginning on July 1, 1992, and ending on June 30, 2012, if the victim of a violation of:

- (1) Cruelty to children, as defined in Code Section 16-5-70;
- (2) Rape, as defined in Code Section 16-6-1;
- (3) Sodomy or aggravated sodomy, as defined in Code Section 16-6-2;
- (4) Statutory rape, as defined in Code Section 16-6-3;
- (5) Child molestation or aggravated child molestation, as defined in Code Section 16-6-4;
- (6) Enticing a child for indecent purposes, as defined in Code Section 16-6-5; or
- (7) Incest, as defined in Code Section 16-6-22,

is under 16 years of age on the date of the violation, the applicable period within which a prosecution shall be commenced under Code Section 17-3-1 or other applicable statute shall not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency, prosecuting attorney, or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental agency shall promptly report such allegation to the appropriate prosecuting attorney.

(b) For crimes committed on and after July 1, 2012, if the victim of a violation of:

- (1) Trafficking a person for sexual servitude, as defined in Code Section 16-5-46;
- (2) Cruelty to children in the first degree, as defined in Code Section 16-5-70;
- (3) Rape, as defined in Code Section 16-6-1;
- (4) Aggravated sodomy, as defined in Code Section 16-6-2;
- (5) Child molestation or aggravated child molestation, as defined in Code Section 16-6-4;

(6) Enticing a child for indecent purposes, as defined in Code Section 16-6-5; or

(7) Incest, as defined in Code Section 16-6-22,

is under 16 years of age on the date of the violation and the violation is not subject to punishment as provided in paragraph (2) of subsection (b) of Code Section 16-6-4, paragraph (2) of subsection (d) of Code Section 16-6-4, or subsection (c) of Code Section 16-6-5, a prosecution may be commenced at any time. (Code 1981, § 17-3-2.1, enacted by Ga. L. 1992, p. 2973, § 1; Ga. L. 2012, p. 899, § 4-2/HB 1176.)

The 2012 amendment, effective July 1, 2012, substituted the present provisions of subsection (a) for the former provisions, which read: “(a) If the victim of a violation of:

“(1) Code Section 16-5-70, relating to cruelty to children;

“(2) Code Section 16-6-1, relating to rape;

“(3) Code Section 16-6-2, relating to sodomy and aggravated sodomy;

“(4) Code Section 16-6-3, relating to statutory rape;

“(5) Code Section 16-6-4, relating to child molestation and aggravated child molestation;

“(6) Code Section 16-6-5, relating to enticing a child for indecent purposes; or

“(7) Code Section 16-6-22, relating to incest,

“is under 16 years of age on the date of the violation, the applicable period within which a prosecution must be commenced under Code Section 17-3-1 or other applicable statute shall not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement

agency, prosecuting attorney, or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental agency shall promptly report such allegation to the appropriate prosecuting attorney.”; and substituted the present provisions of subsection (b) for the former provisions, which read: “This Code section shall apply to any offense designated in paragraphs (1) through (7) of subsection (a) of this Code section occurring on or after July 1, 1992.” See editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

JUDICIAL DECISIONS

Seven year statute of limitations.

Trial court did not err in granting the defendant’s plea in bar to dismiss the counts of an indictment charging the defendant with child molestation and aggravated child molestation to a child under the age of 14 because the state failed to indict the defendant within the limitation period, O.C.G.A. § 17-3-1(c); because the state did not allege that the victim was under the age of 16, the tolling provision of O.C.G.A. § 17-3-2.1 was not invoked.

State v. Godfrey, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Trial court erred in dismissing the counts of the indictment charging the defendant with aggravated child molestation, child molestation, and statutory rape with a child under the age of 16 because the indictment sufficiently invoked the tolling provision of O.C.G.A. § 17-3-2.1; pursuant to O.C.G.A. § 17-3-1(c), the state had seven years to indict the defendant, and the defendant was indicted

within seven years. *State v. Godfrey*, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Indictment filed within 15 year statute of limitations. — With regard to a defendant's conviction for forcible rape of the defendant's child during the time the child was 13 through 15 years of age, the trial court correctly concluded that the state had 15 years from the victim's 16th birthday on January 12, 1995, or until January 12, 2010, to prosecute the case; therefore, no ex post facto violation occurred since the indictment was filed on January 8, 2008. *Duke v. State*, 298 Ga. App. 719, 681 S.E.2d 174 (2009), cert. denied, No. S09C1866, 2010 Ga. LEXIS 31 (Ga. 2010).

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion for a new trial on the ground that the applicable statute of limitations ran on the rape offenses before the defendant was charged because in applying the 1996 amendment to O.C.G.A. § 17-3-1 and the tolling provisions of O.C.G.A. § 17-3-2.1, the limitation period for the defendant's crime ran 15 years from December 13, 1995, when the crimes were first reported to authorities. Thus, because the state

had until December 13, 2010 to indict the defendant, the January 7, 2008, indictment was timely and no ex post facto violation arose because the original seven-year limitation period had not expired at the time. *Flournoy v. State*, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

Allegation of molestation of a child under 16 sufficient to invoke tolling. — Indictment alleging the molestation of a child under the age of 16 sufficiently invoked the statute of limitation tolling provision set forth in O.C.G.A. § 17-3-2.1. *Lyde v. State*, 311 Ga. App. 512, 716 S.E.2d 572 (2011).

State had no actual knowledge of criminal wrongdoing. — Superior court did not err in failing to grant the defendant's plea in bar, motion to dismiss, and general demurrer to prohibit prosecution of the non-murder counts in the indictment as barred by the applicable statutes of limitation because the record did not support a finding that the state had actual knowledge that there was criminal wrongdoing resulting in the fatality, much less that the defendant would be charged as the perpetrator of the victim's death, until the superseding medical examiner's report. *Higgenbottom v. State*, 290 Ga. 198, 719 S.E.2d 482 (2011).

17-3-3. Limitation on prosecutions — Extension of period.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Accusation amended before expiration of statute of limitations. — State could prosecute a count of the indictment under an amended accusation because the indictment was amended before the expiration of the two-year statute of limitation, O.C.G.A. § 17-3-1(d). *Sevostyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012).

Section inapplicable when indictment within initial limitations period. — State did not need to take advantage of the statute of limitations extension provided by O.C.G.A. § 17-3-3 because the second indictment was filed within the initial limitations period. *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

CHAPTER 4

ARREST OF PERSONS

Article 2

Sec.

Arrest by Law Enforcement Officers Generally

Sec.

17-4-30. (Effective January 1, 2013) Arrest of hearing impaired persons.

17-4-40.

warrants requested by others; persons who may issue warrants for arrest of law enforcement or peace officers or school teachers or administrators.

(Effective January 1, 2013. See note.) Persons who may issue warrants for arrest of offenders against penal laws; warrants requested by others; persons who may issue warrants for arrest of law enforcement or peace officers or school teachers or administrators.

Article 3

Warrants for Arrest

17-4-40. (Effective until January 1, 2013. See note.) Persons who may issue warrants for arrest of offenders against penal laws;

ARTICLE 2

ARREST BY LAW ENFORCEMENT OFFICERS GENERALLY

17-4-20. Authorization of arrests with and without warrants generally; use of deadly force; adoption or promulgation of conflicting regulations, policies, ordinances, and resolutions; authority of nuclear power facility security officer.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

GROUNDS FOR WARRANTLESS ARREST

2. OFFENSE COMMITTED IN OFFICER'S PRESENCE

General Consideration

Official immunity found. — Summary judgment in favor of police personnel was proper in action against police chief and officers for false imprisonment under O.C.G.A. § 51-7-20 because the record did not show any support for plaintiff's contentions that the actions of the police officers in arresting plaintiff, following an altercation and in the absence of

exigent circumstances, demonstrated the requisite malice to overcome official immunity under state law. Plaintiff's unsupported allegations of conspiracy to frame him for an altercation are insufficient to pierce the protections of official immunity on these claims. *Goree v. City of Atlanta*, 276 Fed. Appx. 919 (11th Cir. 2008) (Unpublished).

Construed with § 40-13-2.1. — Having elected to issue a citation, a deputy

cannot make a custodial arrest of a driver when the driver refuses to sign the citation. Instead, a deputy shall follow the procedures set forth in O.C.G.A. § 40-13-2.1(a). The language of that statute makes clear that once a deputy or officer issues a citation, the deputy or officer is obligated to follow the procedures set forth in the statute. *State v. Torres*, 290 Ga. App. 804, 660 S.E.2d 763 (2008).

Arrest of passenger on warrant authorized stop of vehicle.

An officer may arrest a suspect without an arrest warrant if an offense has been committed in the officer's presence and while an officer generally must have a search warrant or consent to enter a home to make an arrest, an officer can enter a home to arrest a suspect when the officer has followed the suspect there in "hot pursuit." A suspect may not defeat an arrest which has been set in motion in a public place ... by the expedient of escaping to a private place. For Fourth Amendment purposes, one who is in the threshold of one's dwelling is in a public place and not within the dwelling. *Lawson v. State*, 299 Ga. App. 865, 684 S.E.2d 1 (2009), cert. dismissed, No. S10C0118, 2010 Ga. LEXIS 206 (Ga. 2010); cert. denied, No. S10C0117, 2010 Ga. LEXIS 195 (Ga. 2010).

Cited in *Hight v. State*, 293 Ga. App. 254, 666 S.E.2d 678 (2008); *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Grounds for Warrantless Arrest

2. Offense Committed in Officer's Presence

If officer believes crime occurred or will occur.

Police officer had probable cause to make a warrantless arrest of a defendant for misdemeanor obstruction when the defendant, after being told not to move a car belonging to the defendant's girlfriend because the officer needed to check the car's registration to complete a shoplifting

investigation of the girlfriend, the defendant disobeyed the officer and had a friend remove the car from a store lot. *Stryker v. State*, 297 Ga. App. 493, 677 S.E.2d 680 (2009).

Authority to arrest outside of jurisdiction. — Trial court did not err in granting police officers summary judgment in a citizen's action alleging false imprisonment, assault and battery, and intentional infliction of emotional distress in connection with the defendant's arrest because the arrest was lawful under O.C.G.A. § 17-4-20 since obstruction occurred in the officers' presence; even if the officers did not have probable cause to arrest the defendant, the officers had the authority and discretion to arrest outside the officers' jurisdiction for offenses committed in the officers' presence and, therefore, the officers' immunity could not be defeated by the officers' decision to arrest outside of the officers' jurisdiction. *Taylor v. Waldo*, 309 Ga. App. 108, 709 S.E.2d 278 (2011).

Officer's arrest of restaurant invitee. — Summary judgment was properly granted to a police officer on a restaurant invitee's false imprisonment claim under O.C.G.A. § 51-7-20. The officer, who was told by the restaurant manager that the invitee refused an order to leave the premises, had probable cause to arrest the invitee without a warrant for criminal trespass under O.C.G.A. § 16-7-21. *Kline v. KDB, Inc.*, 295 Ga. App. 789, 673 S.E.2d 516 (2009).

Hotel guest properly arrested for criminal trespass. — Exigent circumstances authorized an officer's warrantless arrest of a hotel guest for criminal trespass because the offense was committed in the officer's presence when the guest refused the officer's request to leave the hotel. Thus, the guest's false imprisonment claim against the hotel was properly dismissed on summary judgment. *Lewis v. Ritz Carlton Hotel Co., LLC*, 310 Ga. App. 58, 712 S.E.2d 91 (2011).

17-4-20.1. Investigation of family violence; preparation of written report; review of report by defendant arrested for family violence; compilation of statistics.

JUDICIAL DECISIONS

Jury instruction based on this section was reversible error. — Jury charge based on O.C.G.A. § 17-4-20.1(a) and (b) was not supported by the evidence because only one of the two parties involved in a domestic dispute reported the incident to law enforcement, and the error was not harmless because it could have

led the jury to conclude that the defendant, who was arrested, was the primary aggressor, and undermined the defense of self-defense, which was not permitted under O.C.G.A. § 16-3-21 if the defendant was the aggressor. *Dean v. State*, 313 Ga. App. 726, 722 S.E.2d 436 (2012).

17-4-23. Procedure for arrests by citation for motor vehicle violations; issuance of warrants for arrest for failure of persons charged to appear in court; bond.

JUDICIAL DECISIONS

Construed with § 40-13-2.1. — Having elected to issue a citation, a deputy cannot make a custodial arrest of a driver when the driver refuses to sign the citation. Instead, a deputy shall follow the procedures set forth in O.C.G.A. § 40-13-2.1(a). The language of that statute makes clear that once a deputy or officer issues a citation, the deputy or officer is obligated to follow the procedures set forth in the statute. *State v. Torres*, 290 Ga. App. 804, 660 S.E.2d 763 (2008).

Extension of authority of municipal police officers.

Municipal officer had authority to arrest defendant under O.C.G.A. § 17-4-23(a) because, after observing defendant operating his motorcycle, the officer had a reasonable suspicion that defendant had been driving under the influence and defendant admitted that the defendant had been driving. *Duprel v. State*, 301 Ga. App. 469, 687 S.E.2d 863 (2009).

Authority to arrest in other jurisdictions. — A Henry County police officer was authorized to stop the defendant in

Spalding County after an off-duty Henry County police officer reported seeing the defendant's vehicle weaving in and out of the defendant's lane and nearly hitting an abandoned vehicle. Under O.C.G.A. §§ 17-4-23 and 40-13-30, county police officers were authorized to arrest persons for traffic offenses in other jurisdictions. *Weldon v. State*, 291 Ga. App. 309, 661 S.E.2d 672 (2008).

While a defendant claimed that charges including reckless driving should have been dismissed as the first officer lacked authority to arrest the defendant under O.C.G.A. § 40-13-30 as the first officer was out of the officer's jurisdiction, the first officer was permitted to arrest the defendant under § 40-13-30 and O.C.G.A. § 17-4-23(a) as the defendant committed a motor vehicle infraction in the first officer's presence; additionally, the first officer, as a private citizen, could make the arrest under O.C.G.A. § 17-4-60 as the crimes were committed in the first officer's presence. *Griffis v. State*, 295 Ga. App. 903, 673 S.E.2d 348 (2009).

17-4-30. (Effective January 1, 2013) Arrest of hearing impaired persons.

In the event a hearing impaired person is arrested for any alleged violation of a criminal law of this state, the arresting officer shall comply with the provisions of Article 3 of Chapter 6 of Title 24. (Code 1981, § 17-4-30, enacted by Ga. L. 2011, p. 99, § 27/HB 24.)

Effective date. — This Code section becomes effective January 1, 2013.

Cross references. — Hearing impaired person defined, § 30-1-5.

Editor's notes. — Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to

any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 enactment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 3

WARRANTS FOR ARREST

17-4-40. (Effective until January 1, 2013. See note.) Persons who may issue warrants for arrest of offenders against penal laws; warrants requested by others; persons who may issue warrants for arrest of law enforcement or peace officers or school teachers or administrators.

(a) Any judge of a superior, city, state, or magistrate court or any municipal officer clothed by law with the powers of a magistrate may issue a warrant for the arrest of any offender against the penal laws, based on probable cause either on the judge's or officer's own knowledge or on the information of others given to the judge or officer under oath. Any retired judge or judge emeritus of a state court may likewise issue arrest warrants if authorized in writing to do so by an active judge of the state court of the county wherein the warrants are to be issued.

(b)(1) If application is made for a warrant by a person other than a peace officer or law enforcement officer and the application alleges the commission of an offense against the penal laws, the judge or other officer shall schedule a warrant application hearing as provided in this subsection unless the person accused has been taken into custody by a peace officer or law enforcement officer or except as provided in paragraph (6) of this subsection; provided, however, that a warrant may be denied without the notice required in paragraph (2) of this subsection where the application form and any testimony from the affiant provided at the time of the application do not demonstrate probable cause for issuing a warrant.

(2) Except as otherwise provided in paragraph (6) of this subsection, a warrant application hearing shall be conducted only after

attempting to notify the person whose arrest is sought by any means approved by the judge or other officer which is reasonably calculated to apprise such person of the date, time, and location of the hearing.

(3) If the person whose arrest is sought does not appear for the warrant application hearing, the judge or other officer shall proceed to hear the application and shall note on the warrant application that such person is not present.

(4) At the warrant application hearing, the rules regarding admission of evidence at a commitment hearing shall apply. The person seeking the warrant shall have the customary rights of presentation of evidence and cross-examination of witnesses. The person whose arrest is sought may cross-examine the person or persons applying for the warrant and any other witnesses testifying in support of the application at the hearing. The person whose arrest is sought may present evidence that probable cause does not exist for his or her arrest. The judge or other officer shall have the right to limit the presentation of evidence and the cross-examination of witnesses to the issue of probable cause.

(5) At the warrant application hearing, a determination shall be made whether or not probable cause exists for the issuance of a warrant for the arrest of the person whose arrest is sought. If the judge or other officer finds that probable cause exists, the warrant may issue instant.

(6) Nothing in this subsection shall be construed as prohibiting a judge or other officer from immediately issuing a warrant for the arrest of a person upon application of a person other than a peace officer or law enforcement officer if the judge or other officer determines from the application or other information available to the judge or other officer that:

(A) An immediate or continuing threat exists to the safety or well-being of the affiant or a third party;

(B) The person whose arrest is sought will attempt to evade arrest or otherwise obstruct justice if notice is given;

(C) The person whose arrest is sought is incarcerated or otherwise in the custody of a local, state, or federal law enforcement agency;

(D) The person whose arrest is sought is a fugitive from justice;

(E) The offense for which application for a warrant is made is deposit account fraud under Code Section 16-9-20, and the person whose arrest is sought has previously been served with the ten-day notice as provided in paragraph (2) of subsection (a) of Code Section 16-9-20; or

(F) The offense for which application for the warrant is made consists of an act of family violence as defined in Code Section 19-13-1.

In the event that the judge or officer finds such circumstances justifying dispensing with the requirement of a warrant application hearing, the judge or officer shall note such circumstances on the face of the warrant application.

(7) No warrant shall be quashed nor evidence suppressed because of any irregularity in proceedings conducted pursuant to this subsection not affecting the substantial rights of the accused under the Constitution of this state or of the United States.

(8) Nothing contained in this subsection shall prohibit a judge from denying a warrant based upon the application and testimony heard at the time such application is made without requiring notice to the person whose arrest is sought.

(c) Any warrant for the arrest of a peace officer, law enforcement officer, teacher, or school administrator for any offense alleged to have been committed while in the performance of his or her duties may be issued only by a judge of a superior court, a judge of a state court, or a judge of a probate court. (Orig. Code 1863, § 4595; Code 1868, § 4616; Code 1873, § 4713; Code 1882, § 4713; Penal Code 1895, § 882; Penal Code 1910, § 903; Code 1933, § 27-102; Ga. L. 1974, p. 1230, § 1; Ga. L. 1983, p. 884, § 3-17; Ga. L. 1985, p. 1105, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 2000, p. 1702, § 1; Ga. L. 2010, p. 313, § 1/HB 199.)

The 2010 amendment, effective July 1, 2010, added the proviso at the end of paragraph (b)(1) and added paragraph (b)(8).

Editor's notes. — Code Section 17-4-40 is set out twice in this Code. The

first version is effective until January 1, 2013, and the second version becomes effective on that date.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

17-4-40. (Effective January 1, 2013. See note.) Persons who may issue warrants for arrest of offenders against penal laws; warrants requested by others; persons who may issue warrants for arrest of law enforcement or peace officers or school teachers or administrators.

(a) Any judge of a superior, city, state, or magistrate court or any municipal officer clothed by law with the powers of a magistrate may issue a warrant for the arrest of any offender against the penal laws, based on probable cause either on the judge's or officer's own knowledge or on the information of others given to the judge or officer under oath. Any retired judge or judge emeritus of a state court may likewise issue arrest warrants if authorized in writing to do so by an active judge of the state court of the county wherein the warrants are to be issued.

(b)(1) If application is made for a warrant by a person other than a peace officer or law enforcement officer and the application alleges the commission of an offense against the penal laws, the judge or other officer shall schedule a warrant application hearing as provided in this subsection unless the person accused has been taken into custody by a peace officer or law enforcement officer or except as provided in paragraph (6) of this subsection; provided, however, that a warrant may be denied without the notice required in paragraph (2) of this subsection where the application form and any testimony from the affiant provided at the time of the application do not demonstrate probable cause for issuing a warrant.

(2) Except as otherwise provided in paragraph (6) of this subsection, a warrant application hearing shall be conducted only after attempting to notify the person whose arrest is sought by any means approved by the judge or other officer which is reasonably calculated to apprise such person of the date, time, and location of the hearing.

(3) If the person whose arrest is sought does not appear for the warrant application hearing, the judge or other officer shall proceed to hear the application and shall note on the warrant application that such person is not present.

(4) At the warrant application hearing, the rules of evidence at a commitment hearing shall apply as set forth in paragraph (1) of subsection (d) of Code Section 24-1-2. The person seeking the warrant shall have the customary rights of presentation of evidence and cross-examination of witnesses. The person whose arrest is sought may cross-examine the person or persons applying for the warrant and any other witnesses testifying in support of the application at the hearing. The person whose arrest is sought may present evidence that probable cause does not exist for his or her arrest. The judge or other officer shall have the right to limit the presentation of evidence and the cross-examination of witnesses to the issue of probable cause.

(5) At the warrant application hearing, a determination shall be made whether or not probable cause exists for the issuance of a warrant for the arrest of the person whose arrest is sought. If the judge or other officer finds that probable cause exists, the warrant may issue instantan.

(6) Nothing in this subsection shall be construed as prohibiting a judge or other officer from immediately issuing a warrant for the arrest of a person upon application of a person other than a peace officer or law enforcement officer if the judge or other officer determines from the application or other information available to the judge or other officer that:

(A) An immediate or continuing threat exists to the safety or well-being of the affiant or a third party;

(B) The person whose arrest is sought will attempt to evade arrest or otherwise obstruct justice if notice is given;

(C) The person whose arrest is sought is incarcerated or otherwise in the custody of a local, state, or federal law enforcement agency;

(D) The person whose arrest is sought is a fugitive from justice;

(E) The offense for which application for a warrant is made is deposit account fraud under Code Section 16-9-20, and the person whose arrest is sought has previously been served with the ten-day notice as provided in paragraph (2) of subsection (a) of Code Section 16-9-20; or

(F) The offense for which application for the warrant is made consists of an act of family violence as defined in Code Section 19-13-1.

In the event that the judge or officer finds such circumstances justifying dispensing with the requirement of a warrant application hearing, the judge or officer shall note such circumstances on the face of the warrant application.

(7) No warrant shall be quashed nor evidence suppressed because of any irregularity in proceedings conducted pursuant to this subsection not affecting the substantial rights of the accused under the Constitution of this state or of the United States.

(8) Nothing contained in this subsection shall prohibit a judge from denying a warrant based upon the application and testimony heard at the time such application is made without requiring notice to the person whose arrest is sought.

(c) Any warrant for the arrest of a peace officer, law enforcement officer, teacher, or school administrator for any offense alleged to have been committed while in the performance of his or her duties may be issued only by a judge of a superior court, a judge of a state court, or a judge of a probate court. (Orig. Code 1863, § 4595; Code 1868, § 4616; Code 1873, § 4713; Code 1882, § 4713; Penal Code 1895, § 882; Penal Code 1910, § 903; Code 1933, § 27-102; Ga. L. 1974, p. 1230, § 1; Ga. L. 1983, p. 884, § 3-17; Ga. L. 1985, p. 1105, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 2000, p. 1702, § 1; Ga. L. 2010, p. 313, § 1/HB 199; Ga. L. 2011, p. 99, § 28/HB 24.)

The 2011 amendment, effective January 1, 2013, in the first sentence of paragraph (b)(4), deleted “regarding admission” following “rules” near the beginning and added “as set forth in paragraph (1) of

subsection (d) of Code Section 24-1-2” at the end. See editor’s note for applicability.

Editor’s notes. — Code Section 17-4-40 is set out twice in this Code. The first version is effective until January 1,

2013, and the second version becomes effective on that date.

Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

17-4-41. Contents of affidavits made or warrants issued for arrest of penal offenders.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

REQUIREMENTS FOR AFFIDAVIT OR WARRANT

General Consideration

Mistake in citation of statute irrelevant. — Affidavit given in support of an arrest warrant for the defendant contained all of the required information and was valid; the fact that the affidavit mis-cited the statute that the defendant was accused of violating was irrelevant. *Golden v. State*, 299 Ga. App. 407, 683 S.E.2d 618 (2009), cert. denied, No. S09C1904, 2010 Ga. LEXIS 56 (Ga.); cert. denied, U.S. , 130 S. Ct. 3358, 176 L. Ed. 2d 1250 (2010).

Prosecutor not absolutely immune for advising police on filling out affidavit. — Prosecutor was not entitled to absolute immunity for giving legal advice to police officers on how to fill out affidavits for arrest against a complainant who had sworn a warrant application against one of the officers; had the prosecutor signed the affidavit for the arrest personally, the prosecutor would not have received absolute immunity because the document would have been a sworn factual statement. Because the prosecutor's actions were not in preparation of the prosecutor's own case, were not part of the judicial process, and the prosecutor would not have received absolute immunity had the prosecutor signed the documents personally, the district court erred in granting the prosecutor absolute immunity for giving legal advice to the police. *Holden v. Stich*, No. 10-14260, 2011 U.S. App. LEXIS 10499 (11th Cir. May 24, 2011) (Unpublished).

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

Requirements for Affidavit or Warrant

Requirements for affidavits satisfied. — Defendant's plea counsel did not render ineffective assistance of counsel by failing to challenge the legality of arrest warrants because all four of the supporting affidavits unquestionably satisfied the requirements of O.C.G.A. § 17-4-41(a), and based on the information provided in the supporting affidavits, the officer in the case supplied the issuing magistrate with sufficient information to support an independent finding that probable cause existed for the issuance of the warrants; the defendant failed to demonstrate that the defendant's plea counsel's failure to challenge the legality of the warrants prejudiced the defendant because even if counsel had challenged the warrants and was able to suppress any inculpatory statement the defendant made, there was nothing to suggest that the defendant's guilty plea resulted from such a statement. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Misdemeanor accusation did not have to be based on arrest warrant. — There was no merit to a defendant's argument that reversal of the defendant's theft by deception conviction was required because the arrest warrant was not supported by a sufficient affidavit under O.C.G.A. § 17-4-41. Because the defendant had not identified any evidence obtained as a result of the arrest, a new trial

was not required; moreover, a misdemeanor accusation did not have to be based on an arrest warrant. *Bruster v.*

State, 291 Ga. App. 490, 662 S.E.2d 265 (2008).

17-4-44. Warrants may be issued in any county; execution of warrants without backing or endorsement of judicial officer in county where warrant is executed.

JUDICIAL DECISIONS

Invalidity of extraterritorial warrants. — Under O.C.G.A. § 17-4-44, Georgia arrest warrants were invalid because the warrants were executed in Florida, outside of the territorial jurisdiction of the issuing court; thus, the warrants

did not insulate a Georgia sheriff's deputy from liability from a Florida resident's false imprisonment and Georgia state law claims under 42 U.S.C. § 1983. *Brown v. Camden County*, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

17-4-45. Form of affidavit for arrest warrant.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Mistake in citation of statute was irrelevant. — Affidavit given in support of an arrest warrant for the defendant contained all of the required information and was valid; the fact that the affidavit

mis-cited the statute that the defendant was accused of violating was irrelevant. *Golden v. State*, 299 Ga. App. 407, 683 S.E.2d 618 (2009), cert. denied, No. S09C1904, 2010 Ga. LEXIS 56 (Ga.); cert. denied, U.S. , 130 S. Ct. 3358, 176 L. Ed. 2d 1250 (2010).

ARTICLE 4

ARREST BY PRIVATE PERSONS

17-4-60. Grounds for arrest.

Law reviews. — For survey article on criminal law, see 59 *Mercer L. Rev.* 89 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

OFFENSE COMMITTED IN PRESENCE OR WITHIN KNOWLEDGE

General Consideration

Citizen's arrest not valid defense to

offense of false imprisonment. — Trial evidence showed that the defendant confined the victim in the bedroom without

lawful authority. In light of defendant’s testimony that the victim had not been confined at all, trial counsel was not ineffective in failing to pursue jury instructions based on an inconsistent theory that the defendant had in fact confined the victim, but was legally authorized to do so. *Smith v. State*, 314 Ga. App. 583, 724 S.E.2d 885 (2012).

Cited in *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Offense Committed in Presence or Within Knowledge

Sheriff may arrest without warrant for crime committed in presence.

While a defendant claimed that charges

including reckless driving should have been dismissed as the first officer lacked authority to arrest the defendant under O.C.G.A. § 40-13-30 as the first officer was out of the officer’s jurisdiction, the first officer was permitted to arrest the defendant under § 40-13-30 and O.C.G.A. § 17-4-23(a) as the defendant committed a motor vehicle infraction in the first officer’s presence; additionally, the first officer, as a private citizen, could make the arrest under O.C.G.A. § 17-4-60 as the crimes were committed in the first officer’s presence. *Griffis v. State*, 295 Ga. App. 903, 673 S.E.2d 348 (2009).

CHAPTER 5

SEARCHES AND SEIZURES

Article 3

Disposition of Property Seized

- Sec.
- 17-5-51. Forfeiture of weapons used in commission of crime, possession of which constitutes crime or delinquent act, or illegal concealment generally; motor vehicles; definitions; return of firearm to innocent owner.
 - 17-5-52. Sale or destruction of weapons used in commission of crime or delinquent act involving possession; sale of weapons not the property of the defendant; disposition of proceeds of sale; record keeping.
 - 17-5-52.1. Disposal of forfeited or abandoned firearms; innocent own-

Sec.

- ers; auctions; record keeping; liability of government entities.
- 17-5-54. Disposition of personal property in custody of law enforcement agency.
- 17-5-56. Maintenance of physical evidence containing biological material.

Article 4

Investigating Sexual Assault

- 17-5-72. Right to free forensic medical examination.

Article 5

Immigrants

- 17-5-100. Investigation of illegal alien status.

ARTICLE 1
SEARCHES WITHOUT WARRANTS

17-5-1. Search pursuant to lawful arrest authorized.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
JUSTIFICATION FOR WARRANTLESS SEARCH
INCIDENTAL SEIZURE OF UNRELATED EVIDENCE

General Consideration

Cited in *Selvy v. Morrison*, 292 Ga. App. 702, 665 S.E.2d 401 (2008).

Justification for Warrantless Search

Section permits seizure of evidence where lawful arrest effected.

As the defendant was lawfully arrested for traffic violations, the search of the vehicle's passenger compartment incident to that arrest was valid under O.C.G.A. § 17-5-1, the Fourth Amendment, and the Georgia Constitution. *Garcia v. State*, 293 Ga. App. 422, 667 S.E.2d 205 (2008).

Evidence of consent sufficient to authorize search of vehicle.

With regard to a defendant's convictions for possession of methamphetamine with intent to distribute, possession of a firearm during the commission of a drug offense, and carrying a concealed weapon, the trial court properly denied the defendant's motion to suppress the items seized from the defendant's vehicle and the defendant's person after a traffic stop as the defendant's failure to wear a seatbelt and to have insurance on the vehicle justified the traffic stop. Thereafter, after being released from the traffic stop and being asked to come back, the defendant consented to the search of the vehicle and of the defendant's person, which led to the seizure of the contraband. *Hughes v. State*, 293 Ga. App. 404, 667 S.E.2d 163 (2008).

Search of automobile incident to arrest.

Trial court did not err in denying the defendant's motion to suppress as the officers could lawfully search the interior of the defendant's car. A sergeant who had received a report of a speeding car had a reasonable and articulable suspicion of criminal activity having occurred, and after the defendant fled and disobeyed an order to stop, a second officer had probable cause to arrest the defendant for obstruction following which the car interior could be lawfully searched under O.C.G.A. § 17-5-1. *Spence v. State*, 295 Ga. App. 583, 672 S.E.2d 538 (2009).

Search based on outstanding arrest warrant. — Marijuana found in a search of the defendant incident to the defendant's arrest was admissible under O.C.G.A. § 17-5-30 because a police dispatcher's statement to an officer that there was an outstanding arrest warrant for the defendant provided the probable cause necessary to arrest the defendant and, as a consequence, the search incident to the arrest was lawful under O.C.G.A. § 17-5-1. *State v. Edwards*, 307 Ga. App. 267, 704 S.E.2d 816 (2010).

Warrantless search of home. — The state could not admit the marijuana discovered in the home of the defendants under either an exigent circumstance or inevitable discovery argument following the officers' warrantless entry into the home. Specifically, evidence of the marijuana on the table was the result of an

illegal entry by the officers and, therefore, could not provide support for the search warrant and a police officer's lone statement that the officers smelled marijuana when the defendants opened the door was insufficient to establish probable cause for a search warrant of the defendant's residence. *State v. Pando*, 284 Ga. App. 70, 643 S.E. 2d 342 (2007).

A violation of O.C.G.A. § 40-5-33 did not justify defendant's continued detention by the police and the officer's decision to detain the defendant while the officer waited for another officer to bring a written warning book was unreasonable; thus, under the totality of the circumstances, the officer did not have specific, articulable facts that could constitute a particularized and objective basis for suspecting that the defendant was involved in any criminal activity thereby making the search unreasonable under the Fourth Amendment and requiring suppression of the evidence seized from the vehicle. *Ben-*

nett v. State, 285 Ga. App. 796, 648 S.E.2d 126 (2007).

Incidental Seizure of Unrelated Evidence

Plain view.

Trial court did not err by limiting the admissibility of admissible items in a defendant's felony murder trial to those items seized incident to the defendant's arrest in the early morning hours and in plain view during the processing of the crime scene as an approximately 15-minute video recording of the premises, which was viewed by the trial court, supported the officers' testimony that guns, shell casings, significant amounts of cash, and items appearing to be crack cocaine were all in plain view and, under the circumstances, presented probable cause as being contraband or evidence of the crime of the felony murder of an officer. *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008).

ARTICLE 2

SEARCHES WITH WARRANTS

17-5-20. Requirements for issuance of search warrant generally.

JUDICIAL DECISIONS

Absence of signature on affidavit did not invalidate search warrant.

Absence of a signature on the affidavit left in the magistrate court's file did not invalidate a search warrant for vehicles because there were multiple original affidavits, only one of which was unsigned, and the warrant actually served contained the affiant's signature; the affiant explained that the affiant took three identical search warrants to the magistrate, that the affiant signed two of the affidavits but inadvertently failed to sign the third one and that the affiant served the defendants with the warrants by leaving copies for the defendants at the jail. *Prado v. State*, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Sufficient particularity in warrant. — Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because

the fact that the investigator who submitted the affidavit for the search warrant did not leave a copy of the affidavit with the warrant at the premises did not render the warrant invalid; the warrant satisfied the particularity requirement of the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIII on the warrant's face because the warrant listed the address of the place to be searched and contained a description of the home, and the warrant also listed items to be seized, including marijuana, weighing devices, and other paraphernalia used in the distribution of drugs. *Pass v. State*, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

Sufficient probable cause.

Trial court properly found that under the totality of the circumstances, the affidavit in support of a search warrant for a residence suspected of being a marijuana

“grow house” gave the magistrate a substantial basis for concluding that probable cause existed because the affidavit set forth the fact that similar investigations and seizures had taken place in several grow houses in the area, the house under surveillance had characteristics similar to those houses, and two men fled from the residence and were apprehended with large amounts of cash; the information from the stop was not excludable as “stale” because there was a substantial basis for believing that the electrical ballasts and light fixtures identified in the search warrant could still be found at the residence and the items were not perishable. *Prado v. State*, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Trial court did not err in denying the defendant’s motion to suppress evidence a detective found in the defendant’s home because given the totality of the circumstances, the magistrate who issued the search warrant was authorized to conclude that there was a fair probability that contraband would be found at defendant’s home; the detective’s affidavit in support of the warrant contained ample facts by which the magistrate could inde-

pendently evaluate the veracity and reliability of anonymous informants and their information, and a confidential informant’s controlled buy of marijuana from the defendant at the defendant’s residence on the day the detective applied for the warrant independently confirmed that illegal drug activities were taking place at the home. *Taylor v. State*, 306 Ga. App. 175, 702 S.E.2d 28 (2010).

Trial court did not err in refusing to suppress the defendant’s hospital records, which showed that the defendant used drugs on the day the defendant shot the victim, because on the evidence’s face, the affidavit for the search warrant issued for the records demonstrated a fair probability that evidence of the defendant’s drug use would be found in the hospital records; the alleged omissions in the affidavit, which was based on the statements of the defendant’s spouse, had the potential to impeach the statements made by the spouse, but the omissions did not eliminate the existence of probable cause because if the omitted material were included in the warrant, probable cause would still exist. *Herrera v. State*, 288 Ga. 231, 702 S.E.2d 854 (2010).

17-5-21. Grounds for issuance of search warrant; scope of search pursuant to search warrant; issuance by retired judge or judge emeritus.

JUDICIAL DECISIONS

ANALYSIS

**GENERAL CONSIDERATION
SUFFICIENCY OF WARRANT**

- 1. TECHNICAL REQUIREMENTS FOR AFFIDAVIT
- 2. PROBABLE CAUSE

SEIZURE OF CONTRABAND NOT IN WARRANT

General Consideration

Medical records were not private papers. — Defendant’s argument that the defendant’s medical records could not have been obtained via search warrant because the records constituted “private papers,” which were exempt from search warrants pursuant to O.C.G.A. § 17-5-21, was unavailing; medical records could have been properly seized pursuant to a search warrant. *Brogdon v. State*, 299 Ga.

App. 547, 683 S.E.2d 99 (2009), *aff’d*, 287 Ga. 528, 697 S.E.2d 211 (2010).

Use of thermal scanning device. — Fruits of a search warrant allowing the police to use a thermal scanning device to search the defendant’s home for anomalous heat loss were not suppressed because “anomalous heat loss” was tangible evidence, under O.C.G.A. § 17-5-21(a)(5), as “anomalous heat loss” was definable and measurable and could, at least in

some cases, be perceived through the sense of touch. *Brundige v. State*, 310 Ga. App. 900, 714 S.E.2d 681 (2011).

Cited in *Carson v. State*, 314 Ga. App. 515, 724 S.E.2d 821 (2012).

Sufficiency of Warrant

1. Technical Requirements for Affidavit

Warrant narrowly drafted. — Trial court did not err in denying the defendant's motion to suppress the results of a blood-alcohol-content test that was obtained via the seizure of the defendant's blood samples and pursuant to a search warrant because the warrant was narrowly drafted to seek only the blood samples and medical records from the hospital where the defendant was treated on the night of the accident; even if the warrant could be construed as authorizing a broader seizure of all of the defendant's medical records instead of only those relevant to the defendant's treatment related to the accident, the defendant failed to show that any such broader seizure occurred and, thus, failed to show any harm. *Jones v. State*, 313 Ga. App. 590, 722 S.E.2d 202 (2012).

Description in warrant held sufficient.

With regard to defendant's conviction for possession of marijuana with the intent to distribute, even if defendant had not waived the issue of defense counsel being ineffective for failing to file a motion to suppress, the challenge was meritless since the search warrant properly named the package the police sought to seize, which defendant picked up at a mailing store, and the warrant did not need to name defendant's vehicle, which defendant entered into with the package. *Ferguson v. State*, 292 Ga. App. 7, 663 S.E.2d 760 (2008).

Affidavit based on information from ISP. — GBI agent was authorized to rely on information regarding sexually explicit images of children as reported by an internet service provider (ISP) pursuant to the ISP's statutory reporting obligation set forth in 42 U.S.C. § 13032(b)(1); the ISP's report was the equivalent of one made from a law-abiding

concerned citizen, and therefore was afforded a preferred status insofar as testing the credibility of the information. *Manzione v. State*, 312 Ga. App. 638, 719 S.E.2d 533 (2011), cert. denied, No. S12C0485, 2012 Ga. LEXIS 308 (Ga. 2012).

2. Probable Cause

Evidence held sufficient to establish probable cause.

In a defendant's prosecution for malice murder in which defendant's spouse was the victim, a motion to suppress evidence seized from the defendant's Florida home was properly denied because even after excision of information from an unreliable informant, the reconstituted affidavit provided probable cause to issue a search warrant under O.C.G.A. § 17-5-21(a) based on an affidavit containing information about the defendant's pending divorce from the spouse and phone calls to and from the defendant at the time of the murder. *Sullivan v. State*, 284 Ga. 358, 667 S.E.2d 32 (2008).

With regard to a defendant's convictions on multiple counts of rape and related crimes, the magistrate was presented with facts sufficient to show probable cause that a crime was being committed or had been committed to support the search of the defendant's home since, even excluding the photographic line-up identification of the defendant that was made by one victim that the state conceded was illegal, there was remaining additional evidence to have established probable cause to have searched the defendant's home. Namely, the same victim's cell phone was taken by the perpetrator and a phone call was made to the defendant's home from the cell phone, the physical description of the perpetrator by the victim matched the defendant's appearance, as did the victim's description of the perpetrator's vehicle, which matched the defendant's vehicle. *Baker v. State*, 295 Ga. App. 162, 671 S.E.2d 206 (2008), cert. denied, No. S09C0571, 2009 Ga. LEXIS 183 (Ga. 2009).

Trial court did not err in denying the defendant's motion to suppress evidence seized in a hotel suite because under the totality of the circumstances, the magis-

trate was authorized to make a pragmatic, commonsense judgment that there was a fair probability that a search of the suite would produce evidence that the occupants were in possession of drugs; a detective interviewed a member of the hotel's housekeeping staff who had seen drugs in the suite, and the affidavit showed that the witness, who was identified by name in the affidavit, reported that a guest in the room requested that the suite be cleaned while the guests went to get something to eat and that immediately upon entering the suite, the housekeeper observed a large quantity of what appeared to be marijuana and other drugs lying openly on the desk and television. *Glass v. State*, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence seized from a search warrant authorizing entry into the defendant's home because the affidavit submitted in support of the warrant provided a sufficient basis for the magistrate to make a practical, commonsense decision that there was a fair probability that evidence of sexual exploitation of children would be found at the defendant's residence; the National Center for Missing and Exploited Children forwarded the information it received from a security specialist employed by the host of the website to the Georgia Bureau of Investigation (GBI), and the affidavit of a special agent with the GBI set forth facts that showed both the reliability and basis of knowledge of the specialist. *James v. State*, 312 Ga. App. 130, 717 S.E.2d 713 (2011), cert. denied, No. S12C0347, 2012 Ga. LEXIS 227 (Ga. 2012).

Disregard of false or omitted information. — Probable cause existed to is-

sue warrant for search of a defendant's residence on the basis of a controlled buy of 3.5 grams of cocaine from the residence, regardless of allegedly false additional statements that the defendant had possessed handguns and narcotics at the residence in the recent past. *Daniel v. State*, 306 Ga. App. 48, 701 S.E.2d 499 (2010).

Seizure of Contraband Not in Warrant

Officers may seize incriminating items in plain view.

Officer in the process of executing a lawful search warrant was authorized under O.C.G.A. § 17-5-21(b) to seize a defendant's tennis shoes, which appeared to the officer to be stained with blood, after performing a field test that confirmed the presence of blood because the shoes were in plain view as the officers lawfully searched the defendant's room for items stolen in a string of burglaries. *Bryant v. State*, 304 Ga. App. 456, 696 S.E.2d 439 (2010).

Search did not exceed scope of warrant. — Trial court did not err in finding that an officer's search of the defendant's computer did not exceed the scope of the warrant seeking evidence of illegal drug transactions because the warrant permitted the search of personal computers at the subject address since electronic records of illegal drug transactions were included amongst those items to be searched; the officer searching the defendant's computer did not engage in a wholesale fishing expedition but was instead seeking files encompassed by the warrant when the officer stumbled across the images of child pornography, and the officer immediately halted the search until an additional warrant was obtained. *Henson v. State*, 314 Ga. App. 152, 723 S.E.2d 456 (2012).

17-5-25. Execution of search warrant generally.

JUDICIAL DECISIONS

Delay before leaving copy of warrant on premises. — Suppression of the fruits of a search warrant was not required when a copy of the warrant was not contemporaneously left on the premises where the warrant was executed because:

(1) there was only a one- or two-day delay before a copy was left at the residence; (2) no personal property was seized; and (3) no resulting harm was specified. *Brundige v. State*, 310 Ga. App. 900, 714 S.E.2d 681 (2011).

17-5-27. Use of force in execution of search warrant.

Law reviews. — For note, “Cops or Robbers? How Georgia’s Defense of Habitation Statute Applies to No-Knock Raids

by Police,” see 26 Ga. St. U. L. Rev. 585 (2010).

JUDICIAL DECISIONS

“No-knock” provision should not have been included in the warrant, etc.

Trial court’s grant of the defendants’ motion to suppress evidence obtained from a house was not clearly erroneous because the “no-knock” provision in the search warrant for the house was unsupported by particular facts and circumstances justifying the need for its use and that no exigent circumstances were shown; a single report of the presence of a firearm over five months before the warrant issued, uncorroborated despite con-

tinued surveillance and investigation during that time, was stale. *State v. Barnett*, 314 Ga. App. 17, 722 S.E.2d 865 (2012).

No-knock justified if police fear danger or destruction of evidence.

An agent’s request for a no-knock warrant was properly granted, because the subject had been convicted of theft by receiving stolen property and possession of marijuana with intent to distribute, and further, was the subject of a pending charge for possession of a firearm by a convicted felon. *Kimble v. State*, 301 Ga. App. 237, 687 S.E.2d 242 (2009).

17-5-28. Detention and search of persons on premises.**JUDICIAL DECISIONS****ANALYSIS****TYPES OF SEARCHES****Types of Searches**

Pat-down search to protect from attack.

Trial court properly denied defendant’s suppression motion as drug evidence was properly seized during a pat-down search of defendant’s person for weapons, which

was justified under O.C.G.A. § 17-5-28 because police were in the process of executing a search warrant to search for drugs; a deputy’s removal of a package from defendant’s pants pocket was within the scope of defendant’s consent. *Brint v. State*, 306 Ga. App. 10, 701 S.E.2d 507 (2010).

17-5-29. Written return of items seized; filing and signing of inventory; delivery of copies of inventory.**JUDICIAL DECISIONS**

Untimely return not fatal when no showing of prejudice. — Trial court properly refused to suppress blood and urine test records under O.C.G.A. § 17-5-31, although a written return of the warrant was not made in a timely fashion, as provided in O.C.G.A.

§ 17-5-29, because a defendant received a copy of the inventory of the medical records seized, and made no showing of prejudice as a result of the delayed filing. *Stubblefield v. State*, 302 Ga. App. 499, 690 S.E.2d 892 (2010).

17-5-30. Motion to suppress evidence illegally seized generally.**JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION****SEARCHES**

1. IN GENERAL
2. CONSENT
3. LOCATIONS
4. INVENTORY SEARCH

INFORMANTS**IDENTIFICATION PROCEDURES****APPLICABILITY**

1. IN GENERAL
2. DRUG EVIDENCE
3. PROBATIONERS
4. STATEMENTS AND TESTIMONY
5. VEHICLES
 - A. IN GENERAL
 - B. DRIVING UNDER THE INFLUENCE
 - C. SEARCHES
 - D. TRAFFIC STOPS
6. VIDEOTAPE

WARRANTS AND AFFIDAVITS**EVIDENCE ACQUIRED UNLAWFULLY****REQUIREMENTS FOR MOTION**

1. IN GENERAL
2. WRITING

HEARING PROCEDURE**APPEALS****General Consideration**

Not applicable to suppression of statements. — Despite a claim that a defendant's motion to suppress inculpatory statements made during a police interview was procedurally defective under O.C.G.A. § 17-5-30(b), the granting of such a motion could not be reversed on that basis as the statute only applied to the suppression of tangible evidence. *State v. Lee*, 295 Ga. App. 49, 670 S.E.2d 879 (2008).

Suppression motion properly denied.

Denial of the defendant's motion to suppress was supported by the evidence as a roadblock was proper. All vehicles were stopped at the roadblock and were delayed only one to two minutes unless a violation was noted. The evidence was sufficient to show that the defendant was stopped 17 minutes after the roadblock began.

McGlon v. State, 296 Ga. App. 77, 673 S.E.2d 513 (2009), cert. denied, No. S09C0996, 2009 Ga. LEXIS 359 (Ga. 2009).

Suppression of evidence seized from a defendant's home and car was not required as deputies initially entered defendant's home in search of an assault victim with the defendant's consent, entry into the home was also supported under the exigent circumstances exception to the warrant requirement, blood evidence that was observed in plain view could be seized, photos of evidence inside the home that were in plain view could be taken even if the exigency had expired, photos taken of blood and hair evidence that were in plain view in the defendant's car did not offend U.S. Const. amend. IV, and even if opening the door of the car to assist in taking the photos constituted a warrantless search, it was justified by the exigen-

cies of the case. *Lord v. State*, 297 Ga. App. 88, 676 S.E.2d 404 (2009).

Defendant was properly convicted of trafficking in methamphetamine because the trial court did not err in denying defendant's motion to suppress items police officers seized as a result of a traffic stop of defendant's vehicle when the stop was lawful under the circumstances; because the officer witnessed defendant commit a traffic violation, the officers' action in pulling over the vehicle after defendant committed the traffic violation was valid, even though the officers had ulterior motives in initiating the stop. *Gonzalez v. State*, 299 Ga. App. 777, 683 S.E.2d 878 (2009).

Trial court did not err in denying the defendant's motion to suppress drug evidence because the evidence established the existence of probable cause for the issuance of the search warrant for the defendant's residence; at the suppression hearing, the investigating officer testified as to the same information provided in the affidavit and that the officer had known the informant for 11 or 12 years, the officer had used the informant in at least 20 to 30 prior investigations, and the officer had provided the magistrate with information about the informant's prior work with other officers beyond what was set forth in the affidavit. *Williams v. State*, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Trial court did not err in refusing to suppress statements the defendant made after an officer told the defendant that withholding information would make things worse for the defendant because the officer's statement to the defendant was, in context, an admonition not to damage the defendant's credibility but to tell the truth, and the statement did not show the physical or mental torture or the coercion by threats that constitutes the remotest fear of injury forbidden by O.C.G.A. § 24-3-50; since no promises of lighter punishment were made, such an admonition to tell the truth did not constitute hope of benefit so as to render involuntary any statement made thereafter. *Madrigal v. State*, 287 Ga. 121, 694 S.E.2d 652 (2010), overruled on other grounds, *State v. Kelly*, 290 Ga. 29, 718 S.E.2d 232 (2011).

Trial court did not err in denying the defendant's motion to suppress evidence seized in a hotel suite because under the totality of the circumstances, the magistrate was authorized to make a pragmatic, commonsense judgment that there was a fair probability that a search of the suite would produce evidence that the occupants were in possession of drugs; a detective interviewed a member of the hotel's housekeeping staff who had seen drugs in the suite, and the affidavit showed that the witness, who was identified by name in the affidavit, reported that a guest in the room requested that the suite be cleaned while the guests went to get something to eat and that immediately upon entering the suite, the housekeeper observed a large quantity of what appeared to be marijuana and other drugs lying openly on the desk and television. *Glass v. State*, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence officers seized from defendant's briefcase because the contents of the briefcase were seized pursuant to a valid search warrant based upon information wholly independent from law enforcement's illegal use of the friend to obtain the briefcase, and thus, the search met the criteria for admissibility under the independent source doctrine; although the defendant had a reasonable expectation of privacy in defendant's locked briefcase and did not abdicate control or responsibility of the briefcase, the investigating officer became aware of the existence of the briefcase and the briefcase's contents based upon the statements of the victim and another woman and was able to obtain a search warrant for the briefcase's contents based upon that information. *Wilder v. State*, 304 Ga. App. 891, 698 S.E.2d 374 (2010).

Trial court did not err in denying the defendant's motion to suppress a firearm police officers seized from the defendant's person because the officers conducting the initial pat-down of the defendant acted in accordance with the Fourth Amendment, and there was no taint upon the second pat-down leading to seizure of the firearm; because the initial pat-down of the defendant was supported by particularized

facts observed by the officers, and the defendant's actions were consistent with the officers' hypothesis that the defendant was contemplating a robbery of a store manager, the trial court was authorized to find that a reasonably prudent person under the circumstances would have been warranted in believing that the defendant posed a danger to his or her safety, such that the officers' act of conducting the initial pat-down search for a weapon was constitutionally permissible. *Lewis v. State*, 307 Ga. App. 593, 705 S.E.2d 693 (2011).

Trial court did not err in admitting into evidence the murder weapon and photographs of the crime scene because the search of the defendant's residence was authorized due to the exigent circumstances; officers arrived at the residence to conduct a welfare check and knocked on the door, which caused the door to open slightly, allowing the officers to see the victim lying motionless on the couch, and after the victim failed to respond to the officers' calls, the officers were authorized to proceed into the residence immediately to come to the victim's aid. *Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011).

Lack of standing to challenge search of hotel room as not "aggrieved" party. — Order suppressing evidence seized from a hotel room was error because the defendant was a mere invitee visiting the room and, under O.C.G.A. § 17-5-30(a), only a person aggrieved by an unlawful search and seizure was permitted to move to suppress evidence; the defendant had no reasonable expectation of privacy in the hotel room searched, and thus the defendant was not "aggrieved" by the search within the meaning of § 17-5-30(a) and the Fourth Amendment and lacked standing to contest the search. *State v. Carter*, 299 Ga. App. 3, 681 S.E.2d 688 (2009).

Failure to file motion did not constitute ineffective assistance of counsel.

Defendant could not show that trial counsel's failure to file a motion to suppress constituted deficient performance because the defendant did not establish that a motion to suppress would have been granted; although the defendant ar-

gued that an officer's encounter with the defendant was unsupported by articulable facts of criminal conduct, under the totality of circumstances, the defendant's actions supported a reasonable, particularized suspicion that the defendant was involved in criminal activity. *Odom v. State*, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Defendant's trial counsel was not deficient for failing to file a motion to suppress evidence because the defendant failed to show that police officers lied under oath during the trial; therefore, the defendant was unable to show that, if defense counsel had filed a motion to suppress on that basis, the trial court would have granted the motion. *Bass v. State*, 309 Ga. App. 601, 710 S.E.2d 818 (2011).

Defendant failed to establish that there was a reasonable probability that, but for the alleged deficiencies of trial counsel, the outcome of the trial would have been different because the defendant could not show prejudice due to trial counsel's failure to file a motion to suppress the approximately \$1,500 discovered when the defendant was searched; even if the evidence had been excluded, the remaining evidence adduced at trial was overwhelming. *Lowe v. State*, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Trial counsel did not render ineffective assistance by failing to move to suppress evidence found on the defendant's person because any motion to suppress would have been without merit; when the officers lawfully approached and questioned the defendant the smell of alcohol on the defendant's person and emanating from a cup, and the officers' earlier observations of the defendant staggering and stumbling in the middle of the roadway, gave the officers probable cause to arrest the defendant for unlawfully walking upon the roadway while under the influence of alcohol, O.C.G.A. § 40-6-95, and the cocaine and digital scales subsequently found in the defendant's pockets were discovered pursuant to a lawful search incident to an arrest. *White v. State*, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Trial counsel did not perform deficiently by failing to renew the motion to suppress

after evidence was presented at trial because there was no evidence that a renewed motion would have been granted or that the defendant suffered prejudice as a result of counsel's performance. *Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011).

Searches

1. In General

"Plain feel" doctrine.

Trial court erred in granting the defendant's motion to suppress rings a police officer seized from the defendant's pocket during a pat-down search because the seizure was authorized under the plain feel doctrine; the officer's knowledge that a man matching the defendant's description was suspected of stealing numerous rings shortly beforehand and nearby gave the officer probable cause to believe that the items the officer felt in the defendant's pocket were the stolen rings, and had the rings been in the officer's plain view when the officer detained the defendant, the officer could have seized the rings under the plain view doctrine. *State v. Cosby*, 302 Ga. App. 204, 690 S.E.2d 519 (2010).

Pat-down search exceeded permissible scope.

Officer was justified in conducting a pat-down when the officer testified that the officer observed the defendant place something in defendant's pocket and then place defendant's hand in defendant's pocket; defendant refused to remove defendant's hand although the officer repeatedly instructed the defendant to do so; and, the officer became concerned for the officer's safety because of defendant's actions. However, the trial court erred in denying defendant's motion to suppress since the officer could not identify the object the officer felt as either a weapon, or by its contour and mass, contraband and thus the intrusion into defendant's pocket was impermissible. *Sudduth v. State*, 288 Ga. App. 541, 654 S.E.2d 446 (2007).

Because defendant expressly consented only to a pat-down search for weapons, a police officer could not have lawfully intruded into defendant's pocket to retrieve an identification card; accordingly, the trial court erred by denying defendant's

motion to suppress. *Johnson v. State*, 297 Ga. App. 847, 678 S.E.2d 539 (2009).

No authority to conduct pat-down so motion to suppress should be granted. — Trial court erred in denying the defendant's motion to suppress a gun police officers found on the defendant's person because although the officers had a sufficient basis for a brief initial Terry stop since the defendant partially fit the description given by the victim of the person who attacked the victim, the officers had no authority to conduct the pat-down that discovered the weapon on the defendant's person; the fact that the officers suspected that the defendant could have been the one that assaulted the victim did not reasonably give rise to a belief that the defendant was armed and a threat to the officers, and because the record revealed no proof of other circumstances known to the officers when the officers commenced the frisk that would lead a reasonable officer to conclude that the defendant had a weapon or instrument capable of being used as a weapon on the defendant's person, the state did not carry the state's burden of proving the propriety of the search. *Daniels v. State*, 307 Ga. App. 216, 704 S.E.2d 466 (2010).

Search incident to lawful arrest.

Marijuana found in a search of the defendant incident to the defendant's arrest was admissible under O.C.G.A. § 17-5-30 because a police dispatcher's statement to an officer that there was an outstanding arrest warrant for the defendant provided the probable cause necessary to arrest the defendant and, as a consequence, the search incident to the arrest was lawful under O.C.G.A. § 17-5-1. *State v. Edwards*, 307 Ga. App. 267, 704 S.E.2d 816 (2010).

2. Consent

Scope of consent.

Defendant was not entitled to suppression of, inter alia, marijuana seized from the trunk of a car in which the defendant was a passenger because a police officer did not exceed the scope of the driver's consent to search, which allegedly was limited to looking in the car, by opening the trunk as the officer had discussed the problems with contraband being trans-

ported on the state highways prior to requesting the driver's consent; thus, the driver was on notice that the officer was looking for contraband. *Davis v. State*, 297 Ga. App. 319, 677 S.E.2d 372 (2009).

Consent established even though defendant handcuffed. — Trial court did not err in denying the defendant's motion to suppress evidence police officers seized from the defendant's apartment because the state satisfied the state's burden of showing that the defendant's consent to the search was not the product of coercion, express or implied, and although the defendant was handcuffed at the time the defendant consented to the search, voluntary consent could be given while a suspect was handcuffed; the evidence supported a finding that one of the officers requested and received the defendant's consent to search under permissible circumstances, and the officer testified that the officer's gun was not drawn and that the defendant was compliant. *Silverio v. State*, 306 Ga. App. 438, 702 S.E.2d 717 (2010).

Consent established.

Because defendant waived defendant's Miranda rights and because defendant freely and voluntarily consented to a search of defendant's premises, to a drug test, and to an interview, defendant's consent was not the product of coercion; accordingly, the trial court properly denied defendant's motion to suppress. *Handy v. State*, 298 Ga. App. 633, 680 S.E.2d 646 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer found in the defendant's wallet during a traffic stop of the vehicle in which the defendant was a passenger because the defendant voluntarily consented to the officer's search of the wallet; although the officer did not have a proper basis to frisk the defendant after asking the defendant to exit the automobile, the contraband was not uncovered during the unlawful pat-down, and the prior unlawful pat-down did not operate to invalidate the defendant's later consent to the search of the wallet. *Rogue v. State*, 311 Ga. App. 421, 715 S.E.2d 814 (2011).

Trial court did not err in denying a motion to suppress evidence a police offi-

cer seized in a hotel room because the trial court was authorized to find that the state satisfied the state's burden of showing that the defendant's consent to enter the hotel room was voluntary and not the product of coercion, express or implied; the officer's testimony and the defendant's statement supported a finding that the officer requested and received the defendant's consent to enter the hotel room under circumstances that did not suggest either coercion or threat, and the trial court was authorized to infer that the defendant's consent to search was freely given in the calculated hope that the officer would not find the hidden contraband. *Liles v. State*, 311 Ga. App. 355, 716 S.E.2d 228 (2011).

Consent must be uncoerced.

An officer's statement to the driver of a vehicle that it would be better for the driver if the driver cooperated because a female officer and a drug dog were on the way did not amount to improper coercion so as to render the driver's admission or voluntary relinquishment of cocaine invalid. *Darden v. State*, 293 Ga. App. 127, 666 S.E.2d 559 (2008).

Consent of housing authority director invalid. — City housing authority director's consent to the search of a housing unit was not valid; therefore, an officer's warrantless entry into the premises and seizure of marijuana therein was also invalid. The state failed to show that the terms of the housing unit lease authorized the director to enter the premises under certain circumstances. *Bowden v. State*, 304 Ga. App. 896, 698 S.E.2d 372 (2010).

Illegal, warrantless entry into motel room tainted subsequent consent. — Trial court erred by denying defendant's motion to suppress drug evidence found in a motel room that defendant was occupying with another as the warrantless entry into the hotel room by the police violated the Fourth Amendment and the illegal entry tainted defendant's consent to search and rendered the consent invalid. The state also failed to carry the state's burden to show that a third party's subsequent consent to search the room was untainted by the illegal entry. *Snider v. State*, 292 Ga. App. 180, 663 S.E.2d 805 (2008).

Suppression of evidence from consensual activities.

Because a police officer was authorized to stop defendant's vehicle based on a suspicion that defendant had illegally dumped trash, and because defendant consented to a search of the vehicle, the items seized from the vehicle would not have been suppressed; accordingly, defendant's ineffective assistance claim failed, and the trial court properly denied defendant's motion to withdraw defendant's Alford plea. *Bishop v. State*, 299 Ga. App. 241, 682 S.E.2d 201 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence seized during the warrantless search of the defendant's residence because the evidence supported the trial court's finding that the defendant and the defendant's roommate freely and voluntarily consented to the search of their residence, and the officers testified that the officers did not coerce, threaten, or offer any hope of benefit to obtain the consents; the roommate gave the officers consent to search the common areas of the residence, and after the defendant arrived at the residence, the defendant likewise consented to the searches of the defendant's bedroom and of the defendant's person. *Park v. State*, 308 Ga. App. 648, 708 S.E.2d 614 (2011).

Consent product of illegal detention.

Trial court erred in denying defendant's motion to suppress evidence a police officer found while conducting a search of defendant's person because the purportedly consensual search of defendant's person was unlawful when the consent was the product of an illegal detention; even if defendant's consent was not the product of an illegal detention, the search exceeded the scope of defendant's consent because defendant's indication that the defendant did not "have a problem" with the officer searching the defendant's pockets could not be interpreted as having extended so far as to have authorized the officer to, after searching all of defendant's pockets and finding nothing, push defendant's abdomen, pull defendant's waistband forward, and look down inside defendant's pants for narcotics. *Walker v. State*, 299 Ga. App. 788, 683 S.E.2d 867 (2009).

Two defendants had a reasonable expectation of privacy in a motel room and the room's safe because the defendants were staying there overnight and had clothing there, although neither was a registered guest, so that the defendants both had standing under O.C.G.A. § 17-5-30(a) to object to a search of the room. Because the male guest was illegally detained, that guest's consent to search the room was not valid. *State v. Woods*, 311 Ga. App. 577, 716 S.E.2d 622 (2011).

Defendant never withdrew consent to search. — With regard to defendant's conviction for possession of methamphetamine, the trial court properly denied the defendant's motion to suppress the drugs found on the defendant's person as the police obtained the defendant's consent to search the defendant's person and the defendant's failure to produce all of the items from the defendant's pockets did not amount to a withdrawal of the consent to search. *Allison v. State*, 293 Ga. App. 447, 667 S.E.2d 225 (2008).

Consent of parents of adult child staying at parents home. — With regard to defendant's convictions for armed robbery and possession of a gun during a crime, the trial court properly denied the defendant's motions to suppress the evidence found in the defendant's bedroom and in the vehicle that the defendant operated as the defendant's parents had authority to give consent to the police to search the defendant's unlocked bedroom since the defendant did not pay rent and was only home for the summer from college. As to the vehicle, the parents asked the police to locate their vehicle and the police properly seized the vehicle, impounded the vehicle, and obtained a search warrant; thus, the rifle used during the robberies that was found in the trunk of the vehicle was not the product of an illegal search. *Warner v. State*, 299 Ga. App. 56, 681 S.E.2d 624 (2009), cert. denied, No. S09C1952, 2010 Ga. LEXIS 35 (Ga. 2010).

3. Locations

Search of home illegal.

Under O.C.G.A. § 17-5-30(b), the state bears the burden of proving the lawfulness of a search when it is an unconsented

police entry into a home. Since there were no exigent circumstances justifying the entry of the police into defendant's trailer to arrest persons for underage drinking, the trial court properly granted defendants' motion to suppress the evidence seized from the unlawful entry. Statements made by the defendants after exiting the trailer were fruits of the poisonous tree and also had to be excluded. *State v. Ealum*, 283 Ga. App. 799, 643 S.E.2d 262 (2007).

Consent by roommate did not authorize search. — Defendant was entitled to suppression of a gun, money, and drugs seized from the defendant's residence because the search was unreasonable under the Fourth Amendment as the defendant was not informed when the police came to the residence and arrested the defendant on an outstanding warrant that the defendant's roommate had consented to the search of the residence; the defendant could have erroneously believed that the search was incident to the arrest on a driving violation. *Preston v. State*, 296 Ga. App. 655, 675 S.E.2d 553 (2009).

Search of apartment where drugs were found in plain view.

In a cocaine trafficking prosecution, though the defendant testified that an officer kicked in the door to the defendant's residence, as the defendant's landlord testified that there was no damage to the front door, and the trial court was entitled to believe the officer's testimony that the door was open, the officer was entitled to seize drugs seen in plain view through the open door. Therefore, the defendant's motion to suppress the drugs was properly denied. *Reid v. State*, 298 Ga. App. 889, 681 S.E.2d 671 (2009).

Search of defendant's pursue unauthorized and evidence suppressed. — Defendant, who was not suspected of any crime at the time defendant consented to a search of defendant's vehicle, was merely a visitor to the house and did not tell the police officer to search for the keys to the vehicle, but only stated where the defendant thought the keys might be. Defendant never specifically consented to a

search of defendant's purse. Under these circumstances, the trial court was authorized to find that a typical reasonable person would not have understood the exchange between defendant and the officer to grant the officer permission to search the defendant's purse; therefore, defendant's motion to suppress narcotics found in the purse was properly granted. *State v. Fulghum*, 288 Ga. App. 746, 655 S.E.2d 321 (2007).

Brass knuckles found during investigatory stop occurring in high school parking lot. — Trial court properly denied a defendant's motion to suppress brass knuckles a police officer found in the defendant's pocket during an investigatory stop in a high school parking lot because under the totality of circumstances, the brief stop was neither arbitrary or harassing but was based on a founded suspicion of criminal activity; it was reasonable for the officer to infer, based on the officer's training, experience, and common sense, that the defendant was looking to engage in criminal activity, and the officer had been hired to secure the lot and to guard against fighting. *Esposito v. State*, 293 Ga. App. 573, 667 S.E.2d 425 (2008), cert. denied, No. S09C0184, 2009 Ga. LEXIS 267 (Ga. 2009).

Consent given by outbuilding owners and property deemed abandoned. — With regard to a defendant's convictions for sexual abuse of a child, the trial court properly denied the defendant's motion to suppress various items found in an outbuilding that the defendant, the victim, and the victim's parent had been living in as the owners of the outbuilding consented to the entry by the police as well as had brought certain items to the police themselves. The defendant's failure to retrieve the items for over three months, despite repeated requests on the part of the owners to get the items, as well as the defendant moving out of state sufficiently established that the defendant abandoned the property, thus, no illegal search and seizure was possible. *Driggers v. State*, 295 Ga. App. 711, 673 S.E.2d 95 (2009).

4. Inventory Search

Inventory of personal items of arrestee proper.

Trial court did not err in denying the defendant's motion to suppress evidence officers found during the booking process at the detention center because its finding there was probable cause for the defendant's arrest for firing a handgun at a street light at a hotel and was not clearly erroneous when the combined facts and circumstances known to the arresting officers were sufficient to warrant a prudent person in believing that the defendant had committed the offense of discharging a firearm on the property of another without permission in violation of O.C.G.A. § 16-11-104(a); the defendant matched the unique description of one of the shooters provided by the eyewitness and communicated to the responding officers, and the defendant was encountered by the officers near the scene of the shooting incident shortly after the incident occurrence. *Davis v. State*, 304 Ga. App. 355, 696 S.E.2d 381 (2010).

Trial court did not err in denying the defendant's motion to suppress because there was evidence to support the trial court's finding that the officers' search of a zippered, red bag found during the inventory search of the defendant's motorcycle was conducted pursuant to State Patrol procedures, which required that all items of value be listed, and, thus, did not exceed the permissible scope of the inventory search; there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation. *Grizzle v. State*, 310 Ga. App. 577, 713 S.E.2d 701 (2011).

Informants

Direct involvement of confidential informant.

No error occurred in the denial of a defendant's motion to suppress evidence based on a claim that the police lacked probable cause to arrest the defendant; information provided by an informant was reliable and established probable cause because the informant used the defendant as a supplier, the informant set up a buy

from the defendant under police supervision, the informant described in accurate detail the vehicle the defendant would be driving and where and when the sale would occur, and in telling the police that the informant could lead the police to the defendant, the informant made an inculpatory statement related to the defendant's own drug trafficking charge. *Lopez v. State*, 292 Ga. App. 518, 664 S.E.2d 866 (2008).

Information provided by confidential informant was reliable.

Trial court did not err in denying the defendant's motion to suppress on the ground that a confidential informant was not reliable because the basis for the informant's knowledge was that the informant overheard one of the codefendants discuss that there was going to be methamphetamine at the address to be searched, and evidence of the informant's reliability included that the informant had been known to the deputy and that the informant had previously provided information to narcotics agents leading to the seizure of methamphetamine and marijuana and to several drug-related arrests. *Hawkins v. State*, 303 Ga. App. 618, 694 S.E.2d 132 (2010).

Trial court did not err in denying the defendant's motion to suppress drug evidence because the basis of an informant's knowledge was the informant's personal observation of marijuana at the defendant's residence, and the informant's reliability was sufficiently established by evidence that the informant had been known by the investigating officer for 11 or 12 years and had been instrumental in obtaining arrests and convictions in numerous prior cases; while the better practice would have been for the officer to include all information relating to the informant's reliability, the informant's failure to provide the informant's prior criminal history and payment history did not invalidate the warrant in light of the other indicia of the informant's reliability. *Williams v. State*, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Because the information provided by a confidential informant was reliable and substantially corroborated by the police officers, probable cause to search the de-

fendant existed; accordingly, because the warrantless search was authorized with or without defendant's consent, there was no basis to suppress the drug evidence found on defendant's person. *Hall v. State*, 310 Ga. App. 397, 714 S.E.2d 7 (2011).

Informant's information not stale.

Trial court did not err in denying the defendant's motion to suppress because the information a confidential informant provided a narcotics agent was not stale, and in reviewing the totality of the circumstances, the magistrate was authorized to conclude that on a certain date, based on a conversation the informant overheard, methamphetamine was going to be manufactured at the defendant's house; regardless of whether the informant actually heard the information on the date in question, the information provided a substantial basis for believing that when the magistrate issued the warrant methamphetamine was being manufactured at the defendant's residence. *Hawkins v. State*, 303 Ga. App. 618, 694 S.E.2d 132 (2010).

Identification Procedures

Photographic identification.

Trial court did not err in admitting a photograph of the victim with the victim's spouse because the jury observed the victim's spouse when the spouse testified and identified the photograph, and the trial court determined that the admission of the photograph would not give rise to a strong emotion. *Haynes v. State*, 287 Ga. 202, 695 S.E.2d 219 (2010).

Trial court properly denied the defendant's motion to suppress the victim's identification of the defendant in a pre-trial photo array because the array was not impermissibly suggestive; the six men depicted were of the same race or ethnicity, the same general age group, and had similar hairstyles and facial hair. *Delgiudice v. State*, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

Identification evidence not suppressed.

Because there was no likelihood of irreparable misidentification, especially since a witness stated that the witness's identification of defendant was based upon seeing defendant at the scene of the

crime, and because the victim and witness both identified defendant as the shooter at trial, any error in the admission of the show-up identification was harmless; therefore, defendant's motion to suppress was properly denied. *Lee v. State*, 298 Ga. App. 630, 680 S.E.2d 643 (2009).

Trial court properly denied the defendant's motion to suppress identification evidence because the trial court was authorized to find that no substantial likelihood of irreparable misidentification existed; the victim identified the defendant within thirty minutes of the offense, and the victim stated that the victim got a good look at all of the assailants and was one hundred percent sure and knew for a fact that the defendant was the person who demanded money and punched the victim in the face, noting that "it was fresh in his head." *Law v. State*, 308 Ga. App. 76, 706 S.E.2d 604 (2011).

Trial court did not clearly err in denying the defendant's motion to suppress the victim's pre-trial identification of the defendant as the perpetrator because the trial court's ruling was supported by evidence that the victim: (1) knew the defendant from the neighborhood; (2) described the defendant to an officer on the scene; (3) spent 30 minutes or more with the defendant in an apartment talking with the defendant then defending against the attack; (4) quickly and confidently identified the defendant as the victim's assailant upon seeing the defendant's picture; and (5) identified the defendant at the hearing on the motion to suppress and at trial. *Leeks v. State*, 309 Ga. App. 724, 710 S.E.2d 908 (2011).

One-on-one identification evidence admissible. — Trial court did not err in denying the defendant's motion to suppress the victim's pre-trial identification of the defendant during a one-on-one show-up at the police station because the victim had the opportunity to view the attacker's face and focused attention thereon, and the victim's description of the attacker was fairly accurate; the existence of some inconsistencies did not render the victim's testimony inadmissible, but rather was a matter for the jury. *Butler v. State*, 290 Ga. 412, 721 S.E.2d 876 (2012).

Applicability

1. In General

Wiretap warrants. — Trial court properly denied the defendants' motions to suppress evidence officers obtained from intercepted telephone conversations resulting from a series of wiretap warrants, extensions, and amendments because the Georgia wiretap statute, O.C.G.A. § 16-11-64(c), authorized Gwinnett County Superior Court judges, who had jurisdiction over the crimes being investigated, to issue wiretap warrants for interceptions occurring outside of Gwinnett County. *Luangkhot v. State*, 313 Ga. App. 599, 722 S.E.2d 193 (2012).

Not error to deny motion if propriety not used against defendant.

Since no evidence gathered in the search of the defendant's computer or the defendant's jail cell was tendered and admitted against the defendant, even if the trial court erred in denying the defendant's motion to suppress with regard to those two search warrants, the error was harmless. *Glenn v. State*, 288 Ga. 462, 704 S.E.2d 794 (2010).

Evidence arising from first level police-citizen encounter.

Trial court correctly denied the defendant's motion to suppress on the ground that a police officer lacked reasonable suspicion to stop and detain the defendant because there was testimony indicating that the police encounter with the defendant up to the point of defendant's arrest was consensual and involved no coercion or detention; therefore, the trial court was authorized to find that the encounter was of the first tier, a communication between the police and a citizen involving no coercion or detention, and did not require a showing that the officer acted with reasonable suspicion of criminal activity, and once the officer learned that the defendant had been driving with a suspended license, the officer had probable cause to arrest the defendant. *Grimes v. State*, 303 Ga. App. 808, 695 S.E.2d 294 (2010).

Suppression motion properly denied.

Given that an officer, responding to a disturbance call in a remote location of the precinct involving the defendant, had a

reasonable safety concern, and because the call described the defendant as loud, belligerent, and possibly intoxicated, the officer had a sufficient basis to conduct a pat-down search of the defendant; hence, the defendant's motion to suppress the evidence of a concealed weapon and drugs found following a search was properly denied. *Walker v. State*, 289 Ga. App. 657, 658 S.E.2d 207 (2008).

The defendant's motion to suppress was properly denied as there was sufficient evidence for the trial court to conclude that an officer's initial contact with the defendant was a valid second-tier encounter since the officer already knew that the defendant's vehicle had an incorrect tag; as part of a valid second-tier encounter, the officer was authorized to conduct a pat-down search for weapons. As the defendant clearly had a large object in the defendant's pocket, and the trial court had the opportunity to observe the actual size and contours of the object, the officer's suspicion that the pocket contained a weapon was reasonable. *Shoemaker v. State*, 292 Ga. App. 97, 663 S.E.2d 423 (2008).

2. Drug Evidence

Drugs in plain view.

A trial court did not err by limiting the admissibility of items in a defendant's felony murder trial to those items seized incident to the defendant's arrest in the early morning hours and in plain view during the processing of the crime scene as an approximately 15-minute video recording of the premises, which was viewed by the trial court, supported the officers' testimony that guns, shell casings, significant amounts of cash, and items appearing to be crack cocaine were all in plain view and, under the circumstances, presented probable cause as being contraband or evidence of the crime of the felony murder of an officer. *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008).

Trial court properly denied a defendant's motion to suppress the drug evidence found in the defendant's apartment as the evidence authorized the warrantless entry into the apartment based on the officers observing a marijuana cigarette lying next to the door and immediately

smelling the strong odor of burnt marijuana when the door was opened. *Lawrence v. State*, 298 Ga. App. 94, 679 S.E.2d 94 (2009).

Observations of officers justified.

Trial court properly denied a defendant's motion to suppress the drug contraband found under the passenger seat of the vehicle in which the defendant was sitting as the vehicle had sped passed a residence wherein police officers were awaiting the return of an arrestee. The driver's actions in passing the residence warranted an investigative stop based on the belief that the arrestee was in the car and the traffic stop was authorized based on the officers observing the vehicle speeding, thus, the stop of the vehicle was not illegal. *McBee v. State*, 296 Ga. App. 42, 673 S.E.2d 569 (2009).

Trial court did not err in denying the defendant's motion to suppress because the evidence provided sufficient reasonable articulable suspicion to support a brief detention of the defendant; an officer had a particularized and objective basis for suspecting that the defendant was involved in criminal activity when the officer told the defendant to leave a residence because the officer was aware that the owner of the residence was known for dealing narcotics from a number of prior cases the officer had personally worked on, and the officer believed that the defendant was at the residence to buy marijuana. *Hilbun v. State*, 313 Ga. App. 457, 721 S.E.2d 656 (2011).

Use of informant in narcotics cases.

Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because under the totality of the circumstances, the magistrate had a substantial basis for concluding that there was a fair probability contraband would be found at the residence; the affidavit for the search warrant revealed that an informant participated in a drug buy using law enforcement funds, and an officer transported the informant to the premises, where the informant made the purchase, and the informant provided the purchased contraband to the officer. *Pass v. State*, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

Drugs found during pat-down search.

Trial court properly denied a defendant's motion to suppress the evidence of marijuana found on the defendant's person following a traffic stop based on the person's vehicle having a window tint violation as the arrest was lawful based on the officer having probable cause to place the defendant under arrest and subsequently search the defendant's person due to the defendant's admission to having smoked marijuana recently; the smell of marijuana coming from the defendant's person; the bulge in the defendant's pants; the defendant's nervous demeanor; and the defendant's attempt to prevent a lawful pat-down of the defendant's person in the area of the suspicious bulge. *Williams v. State*, 293 Ga. App. 842, 668 S.E.2d 825 (2008).

Trial court erred in denying defendant's motion to suppress evidence a police officer found while conducting a search of defendant's person because the seizure of the drugs was not lawful when the detention of defendant was unreasonable; the officer articulated no particularized and objective basis for suspecting that defendant was or was about to be involved in criminal activity, and the officer's stated reasons for detaining defendant did not constitute an objective basis for suspecting defendant of involvement in drug activity and justify an investigatory detention when there were no complaints that day of drug activity or of defendant's involvement in such activity. *Walker v. State*, 299 Ga. App. 788, 683 S.E.2d 867 (2009).

Trial court erred in granting a defendant's motion to suppress crack cocaine police officers found in the defendant's pants' pocket during a pat-down search because the officers made a valid Terry stop, and the defendant was not free to leave; the undisputed testimony from the officers was that based on the officers' experience, outside window tinting was often performed on stolen cars, defendant and other men were working on a car in a vacant lot, the car had no tag, and the men were gathered around the car in a way that could be construed as trying to conceal a stolen automobile. *State v.*

Miller, 300 Ga. App. 55, 684 S.E.2d 80 (2009).

Trial court did not err when the court denied the defendant's motion to suppress because the contact between the defendant and an officer was a first-tier consensual encounter, and the officer was authorized to seize marijuana from the defendant's pocket since the officer asked for consent to search the pocket, and the defendant gave consent; there was no evidence that the encounter involved coercion or detention, and upon feeling a soft, spongy item in the defendant's pocket, the officer was not automatically authorized to search the pocket, but the officer testified that the officer asked for consent to search the pocket and that the defendant gave the defendant's consent. *Ware v. State*, 309 Ga. App. 426, 710 S.E.2d 627 (2011).

Traffic stop leading to narcotics.

Trial court did not err in denying the defendants' motions to suppress drug evidence because the defendants failed to establish that the actions of the arresting officer unreasonably expanded the scope or duration of the traffic stop; because the officer's suspicions were piqued by observations of a truck's condition, the strong scent of perfume emanating from the cab, the demeanor of one the defendants, and the other defendant's responses to the officer's brief questioning, the officer was then prompted and authorized to request a K-9 unit and to run criminal histories on both defendants, and there was no evidence to suggest that the officer delayed in making either query. *Young v. State*, 310 Ga. App. 270, 712 S.E.2d 652 (2011).

State failed to meet the state's burden, under O.C.G.A. § 17-5-30(b), of proving that the search of the defendant's vehicle, following a stop for a traffic violation, and the seizure of the marijuana that was found in the vehicle was lawful because there was no evidence that the investigative detention of the defendant lasted no longer than was necessary to effectuate the purpose of the traffic stop and there was no evidence that the scope of the defendant's detention was carefully tailored to its underlying justification. Moreover, no evidence was adduced that the prolonged detention was justified by a

reasonable, articulable suspicion of other criminal activity. *Nunnally v. State*, 310 Ga. App. 183, 713 S.E.2d 408 (2011).

Trial court erred in granting the defendant's motion to suppress evidence resulting from a police officer's search and seizure because, although the defendant was subjected to a tier-two Terry-type investigative detention, the defendant was not in custody, and the defendant was detained for a reasonable time to investigate in conjunction with the valid stop, and the officer's question regarding whether the defendant was in possession of contraband occurred within a few seconds of the stop, such that no reasonable person could believe that they were under arrest and that they were not free to leave after the officer had been afforded a reasonable time to finish conducting a traffic investigation. *State v. Hammond*, 313 Ga. App. 882, 723 S.E.2d 89 (2012).

Probable cause to suspect drug possession.

Trial court did not err in denying the defendant's motion to suppress cocaine a detective found in the defendant's pocket because the defendant's presence on the premises being searched and defendant's apparent attempt to flee from the premises provided probable cause for the detective to believe that the defendant possessed or was, at least, a party to the crime of possessing, the unlawful contraband specified in the warrant, which authorized the detective to detain defendant and to conduct a warrantless search of defendant's person. *Sheats v. State*, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Search of hotel room. — Trial court did not err in denying the defendant's motion to suppress evidence seized in a hotel suite because the affidavit supporting the search warrant for a hotel suite recited probable cause to believe that drugs would be found on the premises under the defendant's possession, custody, and control, namely the two-room suite that the hotel designated and rented to the defendant. *Glass v. State*, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Suppression motion properly denied following search of vehicle and compartments pursuant to arrest and impoundment. — A trial court did not

err in denying a motion to suppress evidence because the defendant lacked standing to challenge the legality of the search of a bag belonging to a passenger in the defendant's care and in any event, after the defendant and the passenger were arrested, the police were authorized to search the interior of the car, including closed containers inside the passenger compartment, both as a search incident to the arrests and pursuant to impounding the uninsured car. *Driscoll v. State*, 295 Ga. App. 5, 670 S.E.2d 824 (2008).

Inventory search as part of impoundment proper. — Pretermittting whether the search was an appropriate search incident to arrest, the court upheld the propriety of inventory searches subject to a reasonable impoundment in order to protect an owner's property and to protect officers from claims over lost or stolen property. Accordingly, the inventory search was proper. *Dover v. State*, 307 Ga. App. 126, 704 S.E.2d 235 (2010).

Suppression motion properly granted. — Trial court properly granted a defendant's motion to suppress drug evidence seized from the defendant's apartment as the court found that the defendant nor the defendant's friend had consented to the search and exigent circumstances did not exist since the police had confirmed that the defendant was not one of the robbers the police were pursuing and no sound or movement was coming from within the apartment to have given the police a reasonable basis to search the apartment. *State v. Culpepper*, 295 Ga. App. 525, 672 S.E.2d 494 (2009).

Trial court did not err in granting the defendant's motion to suppress the contents of a bag a police officer seized because search of the bag was not justified since police officers' initial approach to a vehicle and questioning of the defendant fell within the realm of a first-tier encounter, requiring no reasonable suspicion of criminal activity, and during that encounter, the defendant was free to refuse to answer or ignore the officers' requests and go on the defendant's way; once one of the officers prevented the defendant from exercising that right, the encounter escalated to a second-tier encounter, but the defendant had done nothing to give rise to

a particularized and objective basis for suspecting the defendant was involved in criminal activity, and the defendant's subsequent refusal to answer the officer's questions as to what was in the bag, and the defendant's placing the bag back in the cupholder, also gave the officer no basis for an investigatory detention. *State v. Jones*, 303 Ga. App. 337, 693 S.E.2d 583 (2010).

3. Probationers

Waiver of rights as special condition of probation. — Trial court did not err in denying the defendant's motion to suppress the results of a search of the defendant's person and home because the defendant validly waived the defendant's Fourth Amendment rights under the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XIII when the defendant entered into a negotiated guilty plea to possession of a firearm and possession of marijuana; the transcripts of the defendant's guilty plea revealed that the defendant was informed by the assistant district attorney that a Fourth Amendment waiver was part of the negotiation, neither the defendant nor the attorney objected to the Fourth Amendment waiver during the plea, the trial court explained the Fourth Amendment waiver to the defendant on the record, and the defendant signed a waiver as a special condition of probation. *Morrow v. State*, 311 Ga. App. 323, 715 S.E.2d 744 (2011), cert. denied, No. S11C1872, 2011 Ga. LEXIS 993 (Ga. 2011).

4. Statements and Testimony

Voluntary confession held admissible.

Trial court did not err in allowing the defendant's statements to the police into evidence because the evidence supported the findings that the statements were freely and voluntarily made, under noncustodial circumstances; a detective testified that the defendant voluntarily came to the police station for an interview, that the defendant was not in custody during the interview and was free to leave at any time, that the defendant was not threatened or promised anything, and that the defendant was allowed to leave

the station after the interview. *Beaudoin v. State*, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Defendant did not demonstrate any harm as a result of the trial court's denial of the motion to suppress statements the defendant made to the police at a hospital because the defendant's on-the-scene confessions, as well as remarks the defendant made to a police officer en route to the hospital, were spontaneous and unsolicited statements not made in response to any form of custodial interrogation; therefore, the confessions were not subject to the strictures of *Miranda* and were admissible without the warnings having been given. *Dailey v. State*, 313 Ga. App. 809, 723 S.E.2d 43 (2012).

Statement induced by written promise not to press additional charges held involuntary. — Defendant was granted new trial for convictions for felony murder and other crimes after it was determined that defendant's statement to detectives as to the location of the gun used in the murder and defendant's provision of the gun to two co-indictees was involuntary and inadmissible under O.C.G.A. § 24-3-50 as the statement was induced by a written promise not to press any additional weapons charges against defendant. *Foster v. State*, 283 Ga. 484, 660 S.E.2d 521 (2008).

Defendant's statement not suppressed.

With regard to a defendant's convictions for aggravated sexual assault and child molestation, the trial court properly denied the defendant's motion to suppress the custodial statement made because the defendant was not in custody when the defendant agreed to speak to detectives in the defendant's office when the defendant admitted to touching the victim and that statement was subsequently repeated at the station after the defendant was read the *Miranda* rights. The statement was made voluntarily and was not the sort of in-custody interrogation forbidden by *Miranda*. *Ellison v. State*, 296 Ga. App. 752, 675 S.E.2d 613 (2009).

Trial court did not err in denying the defendant's motion to suppress statements the defendant made during an on-scene police investigation because

Miranda warnings were unnecessary when the defendant's initial statements on-the-scene were voluntarily made under noncustodial circumstances; the defendant voluntarily admitted to stabbing the victim in the defendant's apartment after an officer advised the defendant that the officer was investigating a report of a possible dead body, and even if the defendant was a suspect while in the presence of police, there was no evidence that the defendant was under any form of restraint or that the defendant had been placed under arrest. Additionally, the trial court did not err in denying the defendant's additional motion to suppress the defendant's post-*Miranda* written statement to a detective as not knowingly, voluntarily, and intelligently made because upon being advised that a dead body had been recovered at the defendant's apartment, the detective advised the defendant of the defendant's *Miranda* rights, and the defendant then waived and gave the defendant's written confession immediately thereafter; nothing of record supported the defendant's claim that the defendant was subjected to an interview lasting "three to four hours," and the defendant did not otherwise contend that the defendant's confession was coerced or induced upon hope of benefit. *Rowe v. State*, 302 Ga. App. 239, 690 S.E.2d 884 (2010).

Trial court did not err in failing to suppress a statement the defendant made to the police because the statement was made during the course of a subsequent interview that the defendant initiated and was admissible; the defendant contacted the case detective and requested a meeting, the detective met with the defendant and again advised the defendant of the defendant's right to counsel, and the defendant waived the defendant's right to counsel and made an incriminating statement. *Haynes v. State*, 287 Ga. 202, 695 S.E.2d 219 (2010).

Trial court did not err by denying the defendant's motion to suppress an in-custody statement the defendant made after waiving the defendant's rights under *Miranda* because the preponderance of the evidence supported the trial court's findings that officers read the defendant the defendant's rights in the defendant's

home in the presence of the defendant's parents and explained the rights to the defendant and that the defendant voluntarily agreed to talk to the officers, and the fact that the defendant was initially found incompetent to stand trial did not demand the conclusion that the defendant lacked the mental capacity to knowingly and voluntarily waive the defendant's rights; the true analysis is whether the totality of the circumstances show that the statement was free and voluntary. *Fife v. State*, 306 Ga. App. 425, 702 S.E.2d 454 (2010).

Trial court did not err in denying the defendant's motion to suppress statements the defendant made in response to questioning at the time of the defendant's arrest regarding whether the defendant lived at an apartment and where the defendant's bedroom was located therein because a police officer testified at the suppression hearing that the officer asked the defendant where the defendant lived in order to determine whether the defendant could give consent to search; inquiring as to a suspect's address is a question commonly associated with arrest and custody and provides no basis for suppression of the response. *Silverio v. State*, 306 Ga. App. 438, 702 S.E.2d 717 (2010).

Trial court properly denied the defendant's motion to suppress statements the defendant made to police officers because the trial court did not err when the court determined, under the objective circumstances attending the police officers' interrogation of the defendant, that a reasonable person in the defendant's position would not have understood that the defendant was in custody at the time the defendant gave the defendant's statements to the officers. *Crawford v. State*, 288 Ga. 425, 704 S.E.2d 772 (2011).

Because the defendant failed to compile a record that demonstrated all that transpired in the trial court with regard to the defendant's motion to suppress statements the defendant made to police officers, the supreme court presumed that the evidence before the trial court supported the court's decision to deny the motion; the appellate record contained no transcription of the defendant's interview as recorded on DVDs, and the defendant failed to make application for the trans-

mission of the DVDs to the supreme court pursuant to Ga. Sup. Ct. R. 71(1). *Crawford v. State*, 288 Ga. 425, 704 S.E.2d 772 (2011).

Trial court did not err in refusing to suppress the defendant's custodial statement because the two officers who interviewed the defendant testified that the defendant was read, and that the defendant understood, the defendant's Miranda rights, that the defendant agreed to talk with the police, that the defendant was not coerced or threatened in any way, that the defendant was not offered any hope of benefit in order to convince the defendant to talk to the police, and that the questioning of the defendant ceased as soon as the defendant asked for a lawyer. *Carter v. State*, 289 Ga. 51, 709 S.E.2d 223 (2011).

Trial court did not err in finding the defendant's statements to a police officer admissible because the defendant's invocation of the defendant's right to remain silent, if any, was equivocal since that statement conflicted with the defendant's immediately preceding verbal indication that the defendant was willing to speak with the detective; thus, the officer had no obligation to stop questioning the defendant, and the officer's attempt to clarify whether the defendant wished to speak with the officer was not improper. *Law v. State*, 308 Ga. App. 76, 706 S.E.2d 604 (2011).

Superior court did not err in denying the defendant's motion to suppress statements the defendant made to law enforcement officers because the defendant's initial statement to a detective was non-custodial, unsolicited and was supported by the record, and therefore, the defendant's capacity to understand the substance of the defendant's rights under Miranda in regard to the first statement was irrelevant; the defendant's initial patrol car statement that the victim's death was an accident was made while the defendant was not in custody, and the defendant's statement was not given in response to any questioning by the detective. *Barrett v. State*, 289 Ga. 197, 709 S.E.2d 816 (2011).

Trial court did not err in denying the defendant's motion to suppress a statement the defendant made in response to

an officer's interrogation regarding the ownership of a vehicle because the trial court's determination that the defendant's statements were not solicited and, therefore, were not protected under *Miranda* were not clearly erroneous since the trial court's findings of fact were supported by the testimony of the officer; the defendant voluntarily started a conversation with the officer by admitting that the defendant was not who the defendant previously stated the defendant was, and the defendant stated that the defendant did not know whose vehicle it was but that the defendant gave somebody drugs so that the defendant could use the car. *Bone v. State*, 311 Ga. App. 390, 715 S.E.2d 789 (2011).

Trial court did not err in denying the defendant's motion to exclude the defendant's out-of-court statement to a detective because the record supported the ruling that the detective reasonably suspected that the defendant was or had been engaged in criminal activity, and the defendant was not under arrest; the detective not only witnessed the defendant engage in a drug transaction, but on the morning of the stop, the defendant obtained a written statement from another party to the transaction confirming the defendant's involvement. The detective also recognized the defendant and the defendant's vehicle from the scene. *Arnett v. State*, 311 Ga. App. 811, 717 S.E.2d 312 (2011).

Trial court did not err in admitting into evidence statements the defendant made in an interview with a television correspondent because the defendant was not in custody for *Miranda* purposes when the statements were made; the correspondent was not an agent of the state, and a reasonable person in the defendant's position would have believed that he or she was free to terminate the interview and leave. *Anguiano v. State*, 313 Ga. App. 449, 721 S.E.2d 652 (2011).

Trial court did not err in refusing to suppress the in-custody statements the defendant, who was a Lithuanian immigrant, made to the police because during the interrogation, officers answered the defendant's questions, and the defendant told the officers that the defendant under-

stood what was being said; at no time did the defendant invoke the right to silence or right to counsel. *Milnavicius v. State*, 290 Ga. 374, 721 S.E.2d 843 (2012).

Even assuming that the trial court erred by admitting the statements the defendant made to the police at a hospital as not tainted by a *Miranda* violation, the error was harmless in light of the fact that the police statements were cumulative of other unchallenged confessions by the defendant; the defendant repeatedly identified oneself at the scene as the sole perpetrator. *Dailey v. State*, 313 Ga. App. 809, 723 S.E.2d 43 (2012).

Defendant's statement should not have been suppressed.

Trial court erred in suppressing statements the defendant made during an interview with detectives after the defendant invoked defendant's right to counsel because defendant's admissions were not elicited by interrogation, much less coerced, and were admissible at trial since the defendant repeatedly initiated conversation and interrupted the detectives to discuss various topics, including defendant's concern for the victim and defendant's account of what had happened at the crime scene, and at no point in the interview did the detectives expressly question the defendant about the crimes, even after the defendant invited such discussion by beginning to talk about the crimes; although the detectives remained in the room with the defendant for a few minutes after the defendant invoked defendant's right to counsel, the record of the interview unequivocally showed that the detectives did not engage in any coercive conduct by doing so, and once the detectives took the defendant into custody, the detectives were not obliged to stop listening to what the defendant chose to say or to immediately leave the room so that the detectives could not hear the defendant. *State v. Brown*, 287 Ga. 473, 697 S.E.2d 192 (2010).

Trial court erred in granting the defendant's motion to suppress a confession because investigators' statements that the defendant would go home after the interview did not offer the defendant a "hope of benefit" that would otherwise render the defendant's confession inadmissible, and

even if the complained-of statements did constitute an improper “hope of benefit,” the investigators did not actually induce the defendant’s confession; the investigators’ statement that the defendant would not be arrested on the spot was collateral and not the type of “hope of benefit” contemplated by O.C.G.A. § 24-3-50. *State v. Brown*, 308 Ga. App. 480, 708 S.E.2d 63 (2011).

Defendant’s statement should have been suppressed. — Trial court erred by denying the defendant’s motion to suppress the defendant’s statement to police that the defendant was in the victim’s subdivision on the night of the murder because the defendant unambiguously requested the presence of defendant’s lawyer, and any questioning should have stopped immediately; any ambiguity was created solely by the investigator’s subsequent questioning. *Manley v. State*, 287 Ga. 338, 698 S.E.2d 301 (2010).

Defendant’s admission that the defendant sold vacuum cleaners that had been stolen from a daycare center should have been suppressed because after producing drug paraphernalia, admitting to owning the same, and admitting to recently buying and using drugs, a reasonable person would certainly perceive himself or herself to be in police custody, and the officer’s questioning was clearly aimed at establishing the defendant’s guilt; there was a reasonable possibility that the improperly admitted evidence contributed to the jury’s verdict because there was testimony that the daycare center was located in a neighborhood subject to high crime and drug activity, and the witnesses gave inconsistent descriptions about the color of the vacuum cleaners and the suspect’s clothing. *Thompson v. State*, 313 Ga. App. 844, 723 S.E.2d 85 (2012).

Defendant’s statement suppressed when defendant did not understand rights. — Trial court did not err in granting the defendant’s motion to suppress a statement the defendant gave to the police following the defendant’s arrest because the trial court could have accepted the defendant’s testimony from the hearing on the motion to suppress that the defendant did not understand the defendant’s rights or any waiver of those rights when at least

some evidence existed to support the finding that the defendant’s signature on a waiver of rights form did not indicate that the defendant understood the defendant’s rights and wished to waive them; the trial court could have concluded that the defendant signed the form at a detective’s direction because the detective made no effort to ascertain whether the defendant understood the defendant’s rights and did not testify that the detective believed the defendant understood the rights, when the defendant asked whether the form represented the charges against the defendant the detective responded that the document merely stated that the defendant was a suspect and that the defendant needed to sign the document so the defendant could clear things up, and at no time did the conversation cease, allowing the defendant a clear opportunity to read the form. *State v. Floyd*, 306 Ga. App. 402, 702 S.E.2d 467 (2010).

Suppression of statements impacted by timing of Miranda warnings. — Defendants’ motions to suppress were granted and denied in part as it was error to exclude a statement the defendant made while not in custody; however, delayed Miranda warnings cannot be considered to be effective under *Missouri v. Seibert*, 542 U.S. 600 (2004), and the trial court did not err in suppressing defendants’ oral and written statements made after the detectives administered Miranda warnings. *State v. Pye*, 282 Ga. 796, 653 S.E.2d 450 (2007).

Because a defendant’s motion to suppress specifically requested the suppression of all statements made by the defendant’s codefendants as products of defendant’s illegally-obtained confession, the state could not now complain that the state did not receive reasonable notice that defendant intended to seek suppression of their live testimony at trial. *Stidham v. State*, 299 Ga. App. 858, 683 S.E.2d 906 (2009).

5. Vehicles

A. In General

Roadblocks.

Trial court properly denied a defendant’s motion to suppress the evidence

obtained from a police roadblock with regard to the defendant's conviction for driving under the influence as the trial court properly determined that the roadblock was conducted for a legitimate primary purpose, namely to check for valid licenses, insurance, impaired drivers, and safety concerns, which were consistent with the purposes set forth in the initiation form. Further, a variance in the location of the roadblock to an intersection of a street instead of on the actual street was insignificant and did not invalidate the roadblock. *Coursey v. State*, 295 Ga. App. 476, 672 S.E.2d 456 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence obtained during a roadblock because the evidence was sufficient to show that the decision to implement the roadblock was made by a supervisory officer, which prevented the field officers from exercising unfettered discretion in stopping the drivers since the lieutenant and corporal who implemented the roadblock testified that they were supervisors in the traffic unit of the county sheriff's office; the trial court was authorized to find that the purposes of the roadblock, which were to serve as a traffic safety checkpoint and to check driver's licenses and to identify drivers driving under the influence, were as stated by the lieutenant and corporal, and each of the identified purposes set forth in the order for the roadblock was a legitimate primary purpose. *Rappley v. State*, 306 Ga. App. 531, 702 S.E.2d 763 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence obtained at a roadblock because given the evidence presented, the trial court was authorized to conclude that the sergeant issued the order for the roadblock properly and initiated, authorized, and supervised the roadblock and that the sergeant's decision to implement the roadblock was made at the programmatic level for a legitimate primary purpose; the evidence supported the trial court's findings of fact that the information on the roadblock approval form, which stated the reasons for the roadblock, did not conflict with any evidence presented as to when the roadblock was to be conducted or by whom the roadblock was authorized. *Ow-*

ens v. State, 308 Ga. App. 374, 707 S.E.2d 584 (2011), cert. denied, No. S11C1036, 2011 Ga. LEXIS 498 (Ga. 2011).

Improper expansion of scope of traffic investigation justified suppression. — Police officers impermissibly expanded the traffic stop without reasonable, articulable suspicion, resulting in an illegal detention of both the driver of the vehicle and the passenger and the defendant's consent to search the vehicle was the product of this illegal detention; thus, the evidence obtained as a result of the illegal search was rightfully suppressed. Specifically, the police officer requested permission to search the car "before you guys take off" after returning defendant's license and giving a warning, but while continuing to detain and question the defendants; thus, it was doubtful that any reasonable person in these circumstances would have felt free to disregard the police officer and go. *State v. Conner*, 288 Ga. App. 517, 654 S.E.2d 461 (2007).

Suppression of evidence after violation of § 40-5-33. — A violation of O.C.G.A. § 40-5-33 did not justify defendant's continued detention by the police and the officer's decision to detain the defendant while the officer waited for another officer to bring a written warning book was unreasonable; thus, under the totality of the circumstances, the officer did not have specific, articulable facts that could constitute a particularized and objective basis for suspecting that the defendant was involved in any criminal activity thereby making the search unreasonable under the Fourth Amendment and requiring suppression of the evidence seized from the vehicle. *Bennett v. State*, 285 Ga. App. 796, 648 S.E.2d 126 (2007).

B. Driving Under the Influence

Implied consent warning.

Trial court did not err in denying the defendant's motion to suppress and motion in limine to exclude defendant's field sobriety test results because the implied consent warning was timely given; a HEAT Unit officer gave the defendant the warning immediately after the defendant's arrest. *Waters v. State*, 306 Ga. App. 114, 701 S.E.2d 550 (2010).

Probable cause to believe defendant less safe driver.

Defendant's claim that the trial court erred in denying a motion to suppress because an officer lacked probable cause to arrest defendant failed. Given the defendant's conduct while driving, coupled with the defendant's physical condition at the scene, including stumbling, slurred speech, confusion, and difficulty balancing, the officer had probable cause to arrest the defendant for driving under the influence. *Castaneda v. State*, 292 Ga. App. 390, 664 S.E.2d 803 (2008).

Although defendant had glassy and watery eyes, smelled of alcohol, and admitted to drinking a glass of wine, other testimony supported an inference that defendant was not an impaired driver; accordingly, defendant's motion to suppress was properly granted based on a finding that there was no probable cause to arrest defendant for violating O.C.G.A. § 40-6-391(a)(1). *State v. Goode*, 298 Ga. App. 749, 681 S.E.2d 199 (2009).

Test of defendant's choice.

Trial court did not err in granting the defendant's motion to suppress evidence of a state-administered breath test because the state failed to reasonably accommodate the defendant's request for an independent blood test; when a officer learned that the defendant did not have sufficient cash for a blood test at one of the recommended hospitals the defendant should have been offered the opportunity to use a telephone to make other arrangements, and the officer's unilateral determination that the defendant would be unable to pay for the blood test, without confirming the hospitals' policies regarding payment and without offering to accommodate the defendant in obtaining a method of payment, was insufficient. *State v. Davis*, 309 Ga. App. 558, 711 S.E.2d 76 (2011).

Breath test results properly admitted.

Defendant's motion in limine claiming that an intoxilyzer's seizure of the defendant's breath samples was unlawful because the intoxilyzer's electronic components and operating parts were not properly attached and in good working order as required by O.C.G.A. § 40-6-392

was subject to the requirements of O.C.G.A. § 17-5-30, relating to motions to suppress. *State v. Carter*, 292 Ga. App. 322, 665 S.E.2d 14 (2008).

The fact that a defendant did not have sufficient breath to complete the second of two breath tests did not require suppression of the first test, which indicated a blood alcohol level of .146. *Thrasher v. State*, 292 Ga. App. 566, 666 S.E.2d 28 (2008).

Trial court did not err in admitting the results of the defendant's portable alco-sensor test because even though the defendant was in custody for purposes of *Miranda*, the portable test was administered in response to a demand from the defendant, not the officer; thus, the situation was more akin to a spontaneous outburst from an unwarned suspect or a test conducted pursuant to the Georgia Implied Consent Statute, O.C.G.A. § 40-6-392. *Hale v. State*, 310 Ga. App. 363, 714 S.E.2d 19 (2011).

Court erred in suppressing results of state-administered breath tests.

Intoxilyzer test results were improperly excluded under O.C.G.A. § 40-6-392 since the state produced a properly prepared and executed certificate of inspection certifying that the electronic components and operating parts of the device were properly attached and in good working order. Any failure of the device to have pass an operational requirement by registering a 0.074 reading in the device's analysis of the control solution during the difference check went to the weight, not the admissibility, of the test results. *State v. Carter*, 292 Ga. App. 322, 665 S.E.2d 14 (2008).

Suppression of blood test not required.

Trial court did not err in denying the defendant's motion to suppress the results of a blood-alcohol-content test that was obtained via the seizure of the defendant's blood samples and pursuant to a search warrant because the warrant was narrowly drafted to seek only the blood samples and medical records from the hospital where the defendant was treated on the night of the accident; even if the warrant could be construed as authorizing a broader seizure of all of the defendant's medical records instead of only those rel-

evant to the defendant's treatment related to the accident, the defendant failed to show that any such broader seizure occurred and, thus, failed to show any harm. *Jones v. State*, 313 Ga. App. 590, 722 S.E.2d 202 (2012).

Chemical test results.

Trial court did not err in denying the defendant's motion to suppress and motion in limine to exclude the defendant's field sobriety test results because the officers who stopped the defendant's vehicle were not required to advise the defendant of defendant's Miranda rights prior to the field sobriety testing since although the defendant was not free to leave, the defendant was not handcuffed or placed in the patrol car during the investigation, and in addition to informing the defendant of the reason for the stop, the officers told the defendant that the officers had to wait for a HEAT Unit officer to determine whether the defendant was too impaired to safely operate the defendant's vehicle; based upon the circumstances, the trial court was authorized to find that a reasonable person would believe that the defendant's freedom of action was only temporarily curtailed pending further investigation during the traffic stop, and the delay of approximately twenty-five minutes between the initial stop and the HEAT Unit officer's arrival at the scene did not automatically convert the investigation into a custodial situation. *Waters v. State*, 306 Ga. App. 114, 701 S.E.2d 550 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence of the results of field sobriety tests on the ground that the tests were administered without the defendant having the benefit of a Miranda warning because the defendant was not in custody until after the field sobriety tests were complete; the defendant was allowed to walk around and was not put into handcuffs or a patrol car while the defendant and the first officer awaited the arrival of the second officer, and a reasonable person in the defendant's position could conclude that the person's freedom of action was only temporarily curtailed and that a final determination of the person's status was simply delayed. *DiMauro v. State*, 310 Ga. App. 526, 714 S.E.2d 105 (2011).

Intoxilyzer 5000 test results.

Trial court erred in granting the defendant's motion to suppress a breath test slip from an intoxilyzer and all testimony about the intoxilyzer because no surprise occurred when the defendant's attorney had already been shown the breath test slip and cross-examined a police officer about the slip at the motion hearing, and the state agreed to provide the defendant a copy; although the better practice would have been to provide the defendant a copy of the slip before the trial date, the record demonstrated that the state provided a copy at the hearing on the pretrial motion. *State v. Tan*, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

Trial court erred in granting the defendant's motion to suppress a breath test slip from an intoxilyzer and all testimony about the intoxilyzer because the state was not required to produce the breath test slip to defendant ten days before trial as a part of discovery since the breath test slip did not constitute a written scientific report within the meaning of O.C.G.A. § 17-16-23; no test or analysis was performed because the sample was insufficient, and the breath test slip did not show any test results but reflected only a measurement of breath volume. *State v. Tan*, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

Properly conducted tests admissible. — Trial court did not err in denying a defendant's motion to suppress the results of the defendant's horizontal gaze nystagmus (HGN) field sobriety test and of the Intoxilyzer 5000 breath test, as the administering officer testified to the officer's experience and training as well as the testing and scoring method used regarding the HGN test, and the defendant's constitutional challenges to the admissibility of the Intoxilyzer 5000 breath test results had already been decided in prior case law precedent adversely to the defendant. *Laseter v. State*, 294 Ga. App. 12, 668 S.E.2d 495 (2008).

C. Searches

Automobile exception to warrant requirement.

Trial court committed no error in denying the defendant's motion to suppress physical evidence officers seized from a

pickup truck because the search was authorized under the automobile exception to the warrant requirement when under the totality of the circumstances, the officers had probable cause to believe that the truck contained the illegal crystal methamphetamine that was to form the basis of the drug deal; a narcotics investigator's conversations and interactions with the defendant, combined with the observations of the undercover agents who maintained continuous surveillance of the pickup truck and the movements of the defendant and a codefendant, would have led a reasonable person to believe that the drug contraband was in the truck. *Martinez v. State*, 303 Ga. App. 166, 692 S.E.2d 766 (2010).

Trial court erred in granting the defendant's motion to suppress cocaine an officer found in the defendant's car because the defendant's consent, a search warrant, or exigent circumstances were not required in order to render the search constitutional since the search of the car was authorized under the automobile exception, which applied even if the car was not stopped along a highway but was stationary in a place not regularly used for residential purposes; the officer had probable cause to believe that the car contained crack cocaine, and the officer's observation of what the officer suspected, based upon the officer's law enforcement experience, to be crack cocaine would have led a reasonably discrete and prudent person to believe that drug contraband was in the car. *State v. Sarden*, 305 Ga. App. 587, 699 S.E.2d 880 (2010).

Investigatory stop.

A trial court erred by granting defendant's motion to suppress the evidence of a DUI violation obtained during the traffic stop of the defendant's vehicle by committing clear error in finding that the officer lacked a reasonable, articulable suspicion to stop defendant's car as the officer had received a radio dispatch and had obtained information from a fast-food restaurant employee that suspicious persons in a vehicle were banging on the windows and cursing at the fast-food restaurant. Such actions involved engaging in disorderly conduct, which was an allegation of a crime that gave the officer grounds for

conducting a brief traffic stop of defendant's vehicle for investigatory purposes. *State v. Melanson*, 291 Ga. App. 853, 663 S.E.2d 280 (2008).

Trial court did not err in denying the defendant's motion to suppress due to alleged illegal traffic stops, as even though police officers did not actually see a drug transaction involving the defendant, the circumstances justified an investigative stop of another vehicle driven by individuals observed in an exchange with the defendant in a parking lot. The officers were acting on information that tied a vehicle of the same make and model of the defendant's to illegal drug activity. *Darden v. State*, 293 Ga. App. 127, 666 S.E.2d 559 (2008).

Trial court did not err in granting the defendant's motion to suppress all evidence seized after the vehicle the defendant was driving was stopped because the defendant did not abandon the car or lose any reasonable expectation of privacy with regard to the car; when the defendant ran away after the traffic stop, the police officer had just observed the defendant park the car within a parking space of an apartment complex, where the person to whom the car's registered owner had entrusted the vehicle, and because the evidence from which the officer ascertained the defendant's identity derived from documents found during the unlawful search of the car, the trial court did not err in rejecting the state's argument that the items retrieved from the sidewalk were admissible in a trial against the defendant. *State v. Nesbitt*, 305 Ga. App. 28, 699 S.E.2d 368 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from the defendant's vehicle because the evidence supported the trial court's finding that the officer did not unreasonably prolong the stop of the vehicle, and once the drug dog alerted to the vehicle, the officer had probable cause to search the vehicle; a brief detention was authorized because it was reasonable for the officer to be suspicious in light of the defendant's furtive movement at the initial point of the stop, and that suspicion was heightened when the defendant attempted to explain that the

defendant was looking for the defendant's wallet but then retrieved the defendant's license from a different part of the car, and when the defendant revoked the defendant's consent to search. *Hardaway v. State*, 309 Ga. App. 432, 710 S.E.2d 634 (2011).

Officer had probable cause to believe that, by lying about whether weapons were in a vehicle, the defendant had violated O.C.G.A. § 16-10-20 because at the time the defendant produced the rental agreement for the vehicle, the officer saw a firearm in the center console of the rental car, which the defendant apparently tried to conceal by quickly closing the console; when the officer asked the defendant whether any weapons were in the car the defendant denied it, and that was a reason for the officer to detain the defendant and to secure the firearm for the officer's own safety. *Culpepper v. State*, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Consensual automobile search.

Trial court correctly denied the defendant's motion to suppress evidence obtained during a traffic stop because: (1) there was probable cause for the initial stop, based on an officer's observance of a traffic violation—a nonfunctional tag light; (2) the officer sought and obtained the defendant's voluntary permission to search the car; (3) there was no evidence that the stop was unreasonably prolonged by questioning; and (4) there was no evidence that the officer performed a pat-down search nor that the officer ever put the officer's hands in the defendant's pocket. *Carnes v. State*, 293 Ga. App. 549, 667 S.E.2d 620 (2008).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer found in the defendant's vehicle because the defendant's consent to search the vehicle was not the product of an illegal detention since after returning the defendant's driver's license and issuing a warning ticket, the officer told the defendant that the defendant was free to leave, but the defendant remained on the scene and engaged in casual conversation about the high level of drug activity in the area and the fact that the defendant

worked nearby; the defendant's conduct showed that the defendant did not feel intimidated by the officer's presence, and under the circumstances, the initial traffic stop had de-escalated into a consensual encounter when the officer requested consent to search, which the defendant readily provided, and there was no evidence that the officer coerced the defendant's consent, tricked the defendant, or conveyed a message that the defendant's consent to search was required. *Davis v. State*, 306 Ga. App. 185, 702 S.E.2d 14 (2010).

Trial court did not err in denying the defendant's motion to suppress marijuana a police officer found during the search of the defendant's car because the evidence showed that the defendant was legally detained when the officer requested consent to search; the officer's testimony reflected that the officer sought consent to search immediately after issuing a verbal warning. *Nix v. State*, 312 Ga. App. 43, 717 S.E.2d 550 (2011).

Consent to search of vehicle.

A trial court did not err in denying either defendant's motion to suppress the methamphetamine seized during the consensual search of defendant's vehicle or a motion to suppress defendant's voluntary custodial statement as the testimony of the arresting and investigating officers established that defendant did not display any problems with the understanding of the English language as did videotapes of the vehicle search and the in custody interview, which likewise showed defendant having no problems with the English language. Therefore, defendant's consent to the search of the vehicle nor defendant's waiver of defendant's Miranda rights were invalidated. *Serrano v. State*, 291 Ga. App. 500, 662 S.E.2d 280 (2008).

Trial court did not err in denying the defendant's motion to suppress because an officer did not extend the duration of a traffic stop; the officer's testimony supported the conclusion that the officer asked for consent to search during the time that the officer was issuing citations, and the officer's questioning did not extend the duration of the defendant's detention. *Arroyo v. State*, 309 Ga. App. 494, 711 S.E.2d 60 (2011).

Search of vehicle justified by officer's observations.

Defendant failed to establish that trial counsel's failure to timely file a motion to suppress evidence a police officer seized from the defendant's vehicle prejudiced the case because the warrantless search of the vehicle was lawful under the automobile exception to the warrant requirement; the objective facts known to the officer after the car was lawfully stopped gave the officer probable cause to believe that the car contained contraband, and those facts included the smell of marijuana in the car, flakes of what the officer suspected to be marijuana on the floorboards of the car, and the defendant's visible agitation during the traffic stop. *Brown v. State*, 311 Ga. App. 405, 715 S.E.2d 802 (2011).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from a rental car because the officer had reasonable grounds for detaining the defendant since the officer found the defendant and a friend in the parking lot of a closed business late at night, knew that several burglaries and thefts had occurred in the area recently, and observed that the defendant and the friend appeared to be nervous when the officer spoke with the defendant and the friend; in the course of securing a firearm the officer saw a firearm in the center console of the rental car, the officer saw in plain view a digital scale with white residue, affording the officer probable cause to effect a custodial arrest of the defendant. *Culpepper v. State*, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Search of vehicle not justified by officer's observation. — Trial court erred by denying two defendants' motion to suppress the drug evidence found in the vehicle in which one defendant was driving, and the other defendant was a passenger, because the search of the vehicle was conducted after the defendants were illegally detained after a traffic stop. The officers were justified in stopping the vehicle upon observing the vehicle speeding but by only observing nervousness and an expandable baton, the officers exceeded the scope of a permissible search by continuing to detain the defendants without

any cause to believe the defendants were dangerous; thus, the search was not justified. *Bell v. State*, 295 Ga. App. 607, 672 S.E.2d 675 (2009).

Inventory search of vehicle.

Trial court did not err by denying defendant's motion to suppress evidence obtained at the stop of a vehicle that led to police discovering drugs on defendant's person as officers had probable cause to make the stop and warrantless arrest of defendant based on information received from other officer's involved in a surveillance, who had obtained information from informant that defendant was involved in a controlled buy situation; contrary to defendant's contention on appeal, arresting officers did not lack probable cause because they acted in part on a call from another officer who had information from informant not conveyed to arresting officers. *Bell v. State*, 291 Ga. App. 169, 661 S.E.2d 207 (2008).

Trial court did not err in denying the defendant's motion to suppress because the trial court's finding that the impoundment of the defendant's motorcycle was reasonably necessary under the circumstances was supported by the evidence because the defendant was arrested for attempting to elude police and for several traffic offenses, including driving with an expired license, the defendant was not going to be allowed to drive the motorcycle under any circumstances. *Grizzle v. State*, 310 Ga. App. 577, 713 S.E.2d 701 (2011).

Search after suspect abandoned vehicle.

Trial court did not err in denying the defendant's motion to suppress evidence an officer seized from the defendant's vehicle because the evidence undisputedly showed that the defendant had abandoned the vehicle, and since the defendant abandoned the defendant's car, the defendant had no standing to assert the claim that the search was invalid as a warrantless search incident to an arrest; the defendant abandoned the defendant's vehicle when the defendant fled to escape police, leaving the vehicle parked in a stranger's driveway with the door open, and before searching the open vehicle, an officer even confirmed with the landowner that the defendant's vehicle was not

parked there with the owner's permission. *Johnson v. State*, 305 Ga. App. 635, 700 S.E.2d 612 (2010).

Search proper as inventory and as incident to driver's arrest. — Because an inventory search of a codefendant's vehicle after impoundment was reasonable, and because the search was performed incident to the codefendant's lawful arrest, there was no basis to suppress the evidence seized from the search. *Williams v. State*, 308 Ga. App. 464, 708 S.E.2d 32 (2011).

Evidence found during search of vehicle after accident admissible.

There was no error in denying a motion to suppress as an officer's direction removing the defendant from a car following a traffic stop, which led to the discovery of cocaine, was reasonable given the circumstances. Though the officer had no basis for suspecting unlawful activity, the defendant could not remain in the car because it was going to be towed. *Carter v. State*, 297 Ga. App. 608, 677 S.E.2d 792 (2009).

D. Traffic Stops

Reasonable belief justifying stop.

Because a concerned citizen reported that a suspected drunk driver was driving a specific vehicle in a specific location, a police officer had a reasonable, articulable suspicion to justify an investigative traffic stop; accordingly, defendant did not show a basis for reversing the trial court's order denying defendant's motion to suppress. *Adcock v. State*, 299 Ga. App. 1, 681 S.E.2d 691 (2009).

Trial court did not err in denying the defendant's motion to suppress when a police officer was authorized to stop the vehicle the defendant was driving because of a perceived traffic violation and to continue the officer's investigation because the defendant did not have a driver's license; the particularized and objective basis for the initial stop was the information from the Georgia Crime Information Center that the male owner of the registered vehicle defendant was operating had a suspended driver's license, and once the stop was made, and it was ascertained that the defendant was not the owner of the car, the officer had a duty to further

investigate only because defendant could not produce a driver's license. *Humphreys v. State*, 304 Ga. App. 365, 696 S.E.2d 400 (2010).

Trial court did not err in denying the defendants' motion to suppress evidence police officers seized pursuant to search warrants for a residence and vehicles and a traffic stop because all of the facts, taken together, justified the stop based on a reasonable articulable suspicion that the occupants of the vehicles were involved in an active marijuana growing operation; a search warrant for the residence was pending based on probable cause to believe that an active marijuana growing operation was being conducted inside, the officers had information from multiple sources that the residence was a marijuana grow house, the house exhibited the physical characteristics of other grow houses that had been recently discovered, and the officers observed the defendants driving away from the residence in tandem with a truck and large recreational trailer, which had been obscured in the backyard behind a privacy fence. *Prado v. State*, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Dispatcher's descriptions of vehicle justified stop.

Trial court did not err in denying a defendant's motion to suppress evidence because a traffic stop of the defendant was authorized; an officer had a particularized and objective basis for suspecting the defendant of criminal activity based on the officer's knowledge that the officer was to be on the lookout for a car similar in description to the car defendant was driving and the officer's observations of the defendant's suspicious driving. *Aponte v. State*, 296 Ga. App. 778, 676 S.E.2d 279 (2009).

No justification for stop.

Trial court did not err in granting the defendant's motion to suppress because the trial court was authorized to find that the police officer who initiated the traffic stop lacked an articulable suspicion to believe that the defendant was impeding the flow of traffic in violation of O.C.G.A. § 40-6-184(a) when under the facts, the officer's belief that the defendant was impeding the flow of traffic was an insuffi-

cient basis for initiating an investigative stop; the court of appeals would not disturb the trial court's findings, which was based upon conflicting witness testimony, that at the time of the traffic stop, the defendant was traveling above the posted minimum speed limit and only a few miles below the posted maximum speed limit when defendant's vehicle was passed by two vehicles that were speeding. *State v. Parke*, 304 Ga. App. 124, 695 S.E.2d 413 (2010).

Trial court properly granted the defendant's motion to suppress evidence a deputy sheriff obtained in the course of a traffic stop because its findings that the deputy did not really believe at the time of the stop that the absence of side view mirrors supplied proper grounds for a stop and that the deputy did not, in fact, see anyone toss anything from the car were not clearly erroneous; the factual findings were based not only upon a video that was absent from the record on appeal but also upon an assessment of the credibility of the deputy. *State v. Reid*, 313 Ga. App. 633, 722 S.E.2d 364 (2012).

Stop was not pretextual.

Trial court did not err in denying defendant's motion to suppress items police officers seized as a result of a traffic stop of defendant's vehicle because the stop was lawful under the circumstances; because the officer witnessed defendant commit a traffic violation, the officers' action in pulling over the vehicle after defendant committed the traffic violation was valid, even though the officers had ulterior motives in initiating the stop. *Gonzalez v. State*, 299 Ga. App. 777, 683 S.E.2d 878 (2009).

Defendant's continued detention proper.

Trial court properly denied a defendant's motion to suppress the evidence of drug contraband found in the defendant's vehicle after the vehicle was stopped due to a broken taillight as the officers had the right to detain the defendant while awaiting word as to possible outstanding warrants; a certified drug recognition expert questioned the defendant and observed the defendant having bloodshot eyes, droopy eyelids, and displaying relaxed inhibitions; and the defendant sufficiently and voluntarily consented to the search of

the vehicle as was shown on a videotape of the traffic stop, despite the defendant being handcuffed at the time. *Maloy v. State*, 293 Ga. App. 648, 667 S.E.2d 688 (2008).

Trial court did not err in denying the defendant's motion to suppress marijuana a police officer found in a vehicle in which the defendant was a passenger because the defendant was legally detained when the officer sought the driver's consent to search, and the officer made the officer's request shortly after completing the officer's check of the occupants' identification, which was within six minutes of initiating the stop; having found that the defendant was not subject to an illegal detention, the trial court did not err in further concluding that the defendant lacked standing to challenge the search on other grounds. *Baker v. State*, 306 Ga. App. 99, 701 S.E.2d 572 (2010).

Traffic stop ended prior to consent.

— Defendant was entitled to suppression of marijuana found in a potato chip bag in a car in which the defendant was a passenger because a police officer improperly asked the driver for consent to search the vehicle after handing the driver a citation for a seatbelt violation; the traffic stop ended before the driver gave consent. *State v. Felton*, 297 Ga. App. 35, 676 S.E.2d 434 (2009).

Speeding justified stop.

Trial court did not err in denying the defendant's motion to suppress evidence a police officer obtained through a traffic stop of a driver's vehicle because the stop of the defendant and the driver was valid since the officer's observation that the vehicle was traveling 40 miles per hour in a 35-mile-per-hour zone authorized the officer to initiate the traffic stop, and the officer was on the lookout for the vehicle based on information relayed by the county drug squad; the stop was not illegally extended because it did not matter whether the request to search came during the traffic stop or immediately thereafter, and there was no illegal detention since the questioning was almost instantaneous, all indications were that the search of the vehicle was by consent of the driver. *Hammont v. State*, 309 Ga. App. 395, 710 S.E.2d 598 (2011).

Defendant's continued detention after traffic stop improper. — Trial

court erred in denying the defendant's motion to suppress evidence deputies seized from the defendant's car because the deputies did not have reasonable grounds upon which to continue to detain the defendant after the deputies called for a drug dog; the state offered no evidence that the deputies still were investigating the defendant's failure to properly signal a right turn when the deputies called for a canine unit to come to the scene and detained the defendant until the dog arrived or that the deputies had a reasonable suspicion that the defendant was involved in some criminal activity besides the traffic violation when the deputies called for the drug dog and continued to detain the defendant until the dog arrived and sniffed the car. *Dominguez v. State*, 310 Ga. App. 370, 714 S.E.2d 25 (2011).

6. Videotape

Suppression of videotape not required.

It was not error for the trial court to refuse to suppress a portion of the defendant's videotaped interview with police on the basis that the statements about the defendant's alcohol consumption improperly placed the defendant's character at issue because generally an adult's consumption of alcohol was irrelevant to the issue of character. *Sanford v. State*, 284 Ga. 785, 671 S.E.2d 820 (2009).

Warrants and Affidavits

Affidavit for search warrant insufficient.

Defendant, who was charged with cocaine trafficking and possession of marijuana with intent to distribute, was entitled to suppression of evidence from the search of defendant's residence because the search warrant was based on an officer's affidavit containing untrue information; the officer's interview with a person, who was arrested with defendant, did not contain information, which was included in the officer's affidavit, that this person saw defendant retrieve drugs from the home and hide the drugs in the woods or that this person saw drug paraphernalia in defendant's residence. *State v. Willis*, 302 Ga. App. 355, 691 S.E.2d 261 (2010).

Affidavit for search warrant sufficient. — Even if a magistrate improperly relied upon a bloody sheet seen in plain view in a defendant's home as a basis for issuing a search warrant for the home, the arrest warrant still contained ample evidence from which to find probable cause that the defendant committed a battery on a victim inside the defendant's home; the evidence included the victim's physical injuries, the victim's statement that the defendant had shoved a curling iron down the victim's throat, and the presence of other blood observed inside the house after deputies entered in search of the assault victim. *Lord v. State*, 297 Ga. App. 88, 676 S.E.2d 404 (2009).

Once the trial court found that the detective's affidavit contained sufficient facts for the issuance of the search warrant, it was up to the defendant to produce evidence to support defendant's motion to suppress. Defendant not only failed to do so but failed to insist on a full evidentiary hearing; thus, the state met the state's burden of proof as a matter of law and the denial of defendant's motion to suppress was mandated *Adams v. State*, 300 Ga. App. 294, 684 S.E.2d 404 (2009).

Based on the totality of the circumstances, an affidavit provided a magistrate with a substantial basis for concluding that probable cause existed to believe that contraband would be found in two vehicles because the affidavit in support of the warrant recited the positive alert by an officer's canine as well as the marijuana growing operation in the residence from which the vehicles drove away. *Prado v. State*, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence a detective found in the defendant's home because given the totality of the circumstances, the magistrate who issued the search warrant was authorized to conclude that there was a fair probability that contraband would be found at defendant's home; the detective's affidavit in support of the warrant contained ample facts by which the magistrate could independently evaluate the veracity and reliability of anonymous informants and their information, and a confidential infor-

mant's controlled buy of marijuana from the defendant at the defendant's residence on the day the detective applied for the warrant independently confirmed that illegal drug activities were taking place at the home. *Taylor v. State*, 306 Ga. App. 175, 702 S.E.2d 28 (2010).

Trial court did not err in denying the defendant's motion under O.C.G.A. § 17-5-30 to suppress evidence seized pursuant to search warrants because the reconstituted affidavit supported the issuance of the search warrant; an agent of the Georgia Bureau of Investigation testified that an antifreeze container smelling of gasoline was found in the warranted search of a car registered in the defendant's name and located in the yard of the home of the defendant's parents, and the affidavit executed as part of the application for a warrant to search the car set out the facts surrounding the crime, that the victim's body had been transported from the place where she was killed to the site where her body was found, and that the object of the warrant was one of two vehicles registered to the defendant that he likely used to move the body. *Glenn v. State*, 288 Ga. 462, 704 S.E.2d 794 (2010).

Trial court did not err in denying the defendant's motion under O.C.G.A. § 17-5-30 to suppress evidence seized pursuant to search warrants because the applications for search warrants to search the defendant's apartment and the car for which registration information was given in the detective's affidavit contained sufficient information from which a judicial officer could determine there was a fair probability that evidence of a crime would be found at those sites as the sites were likely methods of transporting the victim and the likely destination of appellant and the victim; in the detective's affidavit, the detective related the discovery of the victim's body and the statements of the victim's friend and roommate concerning the victim's relationship with the defendant, and the victim's pregnancy and identification of the defendant as the father, who was not pleased about the pregnancy. *Glenn v. State*, 288 Ga. 462, 704 S.E.2d 794 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence

seized from a search warrant authorizing entry into the defendant's home because the affidavit submitted in support of the warrant provided a sufficient basis for the magistrate to make a practical, common-sense decision that there was a fair probability that evidence of sexual exploitation of children would be found at the defendant's residence; the National Center for Missing and Exploited Children forwarded the information it received from a security specialist employed by the host of the website to the Georgia Bureau of Investigation (GBI), and the affidavit of a special agent with the GBI set forth facts that showed both the reliability and basis of knowledge of the specialist. *James v. State*, 312 Ga. App. 130, 717 S.E.2d 713 (2011), cert. denied, No. S12C0347, 2012 Ga. LEXIS 227 (Ga. 2012).

Evidence seized as result of warrant.

Because the application for a search warrant established that the victim lived in a residence at a specific address, that defendant lived in the basement apartment located in the residence, that defendant had severely beaten the victim, and that there was a fair probability that evidence of the crime could be found either in defendant's apartment or in the victim's part of the residence, probable cause existed to search defendant's basement apartment and the victim's part of the residence; accordingly, the trial court properly denied defendant's motion to suppress the evidence found in the apartment. *Fletcher v. State*, 284 Ga. 653, 670 S.E.2d 411 (2008).

Trial court did not err in refusing to suppress the defendant's hospital records, which showed that the defendant used drugs on the day the defendant shot the victim, because on the evidence's face, the affidavit for the search warrant issued for the records demonstrated a fair probability that evidence of the defendant's drug use would be found in the hospital records; the alleged omissions in the affidavit, which was based on the statements of the defendant's spouse, had the potential to impeach the statements made by the spouse, but the omissions did not eliminate the existence of probable cause because if the omitted material were in-

cluded in the warrant, probable cause would still exist. *Herrera v. State*, 288 Ga. 231, 702 S.E.2d 854 (2010).

Failure to leave a copy of the supporting affidavit at the searched premises, etc.

Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because the fact that the investigator who submitted the affidavit for the search warrant did not leave a copy of the affidavit with the warrant at the premises did not render the warrant invalid; the warrant satisfied the particularity requirement of the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIII on the warrant's face because the warrant listed the address of the place to be searched and contained a description of the home, and the warrant also listed items to be seized, including marijuana, weighing devices, and other paraphernalia used in the distribution of drugs. *Pass v. State*, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

Search did not exceed warrant. — Because a search warrant referred to the crimes of possession of methamphetamines and theft by receiving stolen property, the warrant did not violate the particularity requirement; therefore, the trial court did not err in denying defendant's motion to suppress. *Allison v. State*, 299 Ga. App. 542, 683 S.E.2d 104 (2009).

Insufficient evidence of existence of valid warrant. — State failed to meet the state's burden under O.C.G.A. § 17-5-30(b) of proving that a search of a defendant's hotel room was made pursuant to a valid warrant because the state failed to produce the warrant or supporting affidavit, and the sheriff's testimony concerning the warrant was hearsay because the sheriff had no personal knowledge of the warrant. *Sosebee v. State*, 303 Ga. App. 499, 693 S.E.2d 838 (2010).

Evidence Acquired Unlawfully

Evidence seized as result of illegal police activity.

Trial court did not err in granting the defendant's motion to suppress statements, drugs, paraphernalia, and cash the police found after searching the defendant's home as fruit of the poisonous tree

because although the police had authority to enter the house for the purpose of apprehending the defendant, the subsequent reentry by the police was illegal since an officer reentered the house without a warrant, valid consent, or exigent circumstances; both before and at the time of the defendant's arrest, the defendant told the police not to enter the house, and it could not be assumed that the victim's need for assistance justified the officer's reentry because the exigent circumstances authorizing entry for the limited purpose of effecting the defendant's arrest had expired. *State v. Driggers*, 306 Ga. App. 849, 702 S.E.2d 925 (2010).

Evidence from exigent circumstances searches.

Trial court did not err in denying the defendant's motion to suppress photographs obtained subsequent to police officers' entry into the defendant's home because the officers' entry was authorized by the exigent circumstances exception to the warrant requirement of the Fourth Amendment; the trial court was authorized to find that the age of the defendant's children, the children's undisputed inability to care for themselves, and the lack of adult supervision due to the defendant's absence and their father's arrest constituted an exigent circumstance that authorized the officers' entry into the residence for the purpose of temporarily supervising the children until a responsible adult arrived to relieve the officers, and once the officers were legally in the house pursuant to the exigent circumstances, the officers were authorized to photograph items of potential evidentiary significance that were in plain view, specifically, the family's living conditions. *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

If illegal arrest, fruits not admissible.

Trial court erred in denying a defendant's motion to suppress because the state did not establish sufficient probable cause to arrest the defendant for driving under the influence since the state offered no evidence showing that the defendant's driving ability was impaired due to alcohol consumption; evidence that an officer smelled alcohol on the defendant's breath, that an alco-sensor test revealed the pres-

ence of alcohol, and that the defendant admitted that the defendant had been drinking “earlier in the day” was insufficient as a matter of law to constitute probable cause to arrest the defendant for driving under the influence. *Handley v. State*, 294 Ga. App. 236, 668 S.E.2d 855 (2008).

Requirements for Motion

1. In General

Contents of motion adequate.

Defendant’s motion to suppress met the requirements of O.C.G.A. § 17-5-30(b) because the motion was sufficient to put the state on notice that all of the searches the state conducted pursuant to a warrant were at issue, that it was necessary to have present at the hearing the affiant detective, and that the legal issue for resolution was the sufficiency of the affidavit. *Glenn v. State*, 288 Ga. 462, 704 S.E.2d 794 (2010).

2. Writing

No objection required when motion in limine obtained. — As a preliminary matter, because the defendant obtained a ruling on a motion in limine, the defendant was not under an obligation to object when the state cross-examined the defendant concerning the defendant’s sexual history and habits. Having obtained a ruling in limine, it was not necessary for the defendant to raise an objection at trial when the evidence was introduced in order to preserve this issue for appellate review. *Herring v. State*, 288 Ga. App. 169, 653 S.E.2d 494 (2007), cert. denied, 2008 Ga. LEXIS 205 (Ga. 2008).

Oral motion inadequate.

Defendant’s oral objection at trial to the admission of alleged cocaine seized from defendant’s person based on Fourth Amendment grounds was not reviewable because the defendant failed to file a written motion to suppress the evidence as required by O.C.G.A. § 17-5-30. *Nelson v. State*, 305 Ga. App. 65, 699 S.E.2d 66 (2010).

Writing and timely filing required.

Defendant waived the issue of suppression of drug evidence because the defendant did not file a written motion to sup-

press under O.C.G.A. § 17-5-30(b) and neither objected to the admission of the drug evidence nor to the deputy’s testimony regarding the search. *Ferrell v. State*, 312 Ga. App. 122, 717 S.E.2d 705 (2011).

Hearing Procedure

Error to barring state to present evidence as sanction. — No constitutional provision or statute authorizes a trial court to bar the state from presenting evidence at a hearing on a motion to suppress as a sanction for prior prosecutorial conduct that the court deems to be dilatory in nature; because evidence exclusion is an extreme sanction and one not favored in the law, a trial court should exercise great caution before barring the state from showing why evidence the state seeks to admit at trial should not be suppressed. *State v. Smith*, 308 Ga. App. 345, 707 S.E.2d 560 (2011).

Appeals

Failure to raise any issue in trial court challenging search warrant. — With regard to a defendant’s convictions on multiple counts of rape and related crimes, because the defendant did not raise any issue in the trial court regarding either the existence of the warrant for the defendant’s blood sample or the adequacy of the supporting affidavit, the appellate court found no merit to the defendant’s contention on appeal that the denial of the defendant’s motion to suppress evidence obtained from the warrant seeking a blood sample was in error. *Baker v. State*, 295 Ga. App. 162, 671 S.E.2d 206 (2008), cert. denied, No. S09C0571, 2009 Ga. LEXIS 183 (Ga. 2009).

State’s appeal.

State’s direct appeal of a judgment granting the defendant’s motion to suppress evidence that the victims identified the defendant from photographic lineups was authorized by O.C.G.A. § 5-7-1(a)(4) because the state’s direct appeal was from an order that: (1) was issued prior to the impaneling of a jury or the defendant being put in jeopardy; and (2) granted the defendant’s motion to suppress evidence that was allegedly obtained in an illegal manner, and which the trial court deemed

to be “meritorious” even apart from the prosecutor’s supposed dilatory conduct; during the final hearing on the defendant’s motion, the trial court refused to allow the state to present evidence to contest the motion as a means of sanctioning the state for prosecutorial conduct that the trial court deemed to be dilatory

in nature, and the fact that the trial court was the direct cause of the state’s inability to meet the state’s burden of showing that the identifications were lawfully obtained in no way divested the court of appeals of jurisdiction to hear the state’s appeal pursuant to § 5-7-1(a)(4). *State v. Smith*, 308 Ga. App. 345, 707 S.E.2d 560 (2011).

17-5-31. Quashing warrant or suppressing evidence because of technical irregularity not affecting substantial rights of accused.

JUDICIAL DECISIONS

Typographical errors.

Affidavit in support of the search warrant was not legally insufficient to establish probable cause when the affidavit identified another individual as the suspected shooter in one paragraph of a six-page affidavit because the investigating officer testified that it was a typographical error and the defendant was correctly named on the warrant and identified as the suspect throughout the majority of the affidavit. *Carson v. State*, 314 Ga. App. 515, 724 S.E.2d 821 (2012).

Because defendant’s house trailer had no house number, description of trailer sufficient. — Trial court did not err in denying a defendant’s motion to suppress evidence based on an allegedly insufficiently particular description of the property to be searched in the warrants.

The warrants described the defendant’s trailer home, which had no house number on the home, and the home’s curtilage on the property where the home was located. *Price v. State*, 303 Ga. App. 859, 694 S.E.2d 712 (2010).

Untimely return of warrant not fatal when no showing of prejudice. — A trial court properly refused to suppress blood and urine test records under O.C.G.A. § 17-5-31, although a written return of the warrant was not made in a timely fashion, as provided in O.C.G.A. § 17-5-29, because a defendant received a copy of the inventory of the medical records seized, and made no showing of prejudice as a result of the delayed filing. *Stubblefield v. State*, 302 Ga. App. 499, 690 S.E.2d 892 (2010).

ARTICLE 3

DISPOSITION OF PROPERTY SEIZED

17-5-51. Forfeiture of weapons used in commission of crime, possession of which constitutes crime or delinquent act, or illegal concealment generally; motor vehicles; definitions; return of firearm to innocent owner.

(a) Except as provided in subsection (c) of this Code section, any device which is used as a weapon in the commission of any crime against any person or any attempt to commit any crime against any person, any weapon the possession or carrying of which constitutes a crime or delinquent act, and any weapon for which a person has been convicted of violating Code Section 16-11-126 are declared to be contraband and are forfeited. For the purposes of this article, a motor

vehicle shall not be deemed to be a weapon or device and shall not be contraband or forfeited under this article; provided, however, that this exception shall not be construed to prohibit the seizure, condemnation, and sale of motor vehicles used in the illegal transportation of alcoholic beverages.

(b) As used in this Code section, the term:

(1) “Firearm” shall have the same meaning as set forth in Code Section 16-11-171.

(2) “Innocent owner” means a person who:

(A) Did not beforehand know or in the exercise of ordinary care would not have known of the conduct which caused his or her firearm to be forfeited, seized, or abandoned to any law enforcement agency of this state or a political subdivision of this state, including the Department of Natural Resources;

(B) Did not participate in the commission of a crime or delinquent act involving his or her firearm;

(C) Legally owned and presently owns the firearm forfeited, seized, or abandoned; and

(D) Is authorized by state and federal law to receive and possess his or her firearm.

(c) A firearm that is the property of an innocent owner shall be returned to such person when such firearm is no longer needed for evidentiary purposes.

(d) The costs of returning the firearm to the innocent owner shall be borne by the innocent owner. Such costs shall be limited to the actual costs of shipping and associated costs from any transfer and background check fees charged when delivering the firearm to the innocent owner.

(e) If six months elapse after notification to the innocent owner of the possession of the firearm by a political subdivision or state custodial agency and the innocent owner fails to bear the costs of return of his or her firearm or fails to respond to the political subdivision or state custodial agency, then the political subdivision or state custodial agency may follow the procedures under subsection (d) of Code Section 17-5-52.1. (Ga. L. 1967, p. 749, § 1; Ga. L. 1977, p. 1131, § 1; Ga. L. 1994, p. 963, § 1; Ga. L. 2010, p. 963, § 2-10/SB 308; Ga. L. 2012, p. 1285, § 2/SB 350.)

The 2010 amendment, effective June 4, 2010, substituted “violating Code Section 16-11-126” for “the crime of carrying a concealed weapon, as provided for by Code

Section 16-11-126,” near the end of the first sentence. See the editor’s note for applicability.

The 2012 amendment, effective May

3, 2012, added the subsection (a) designation; substituted "Except as provided in subsection (c) of this Code section, any" for "Any" in subsection (a); and added subsections (b) through (e).

Editor's notes. — Ga. L. 2010, p. 963, § 3-1, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all

offenses committed on and after June 4, 2010 and shall not affect any prosecutions for acts occurring before June 4, 2010 and shall not act as an abatement of any such prosecution.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

17-5-52. Sale or destruction of weapons used in commission of crime or delinquent act involving possession; sale of weapons not the property of the defendant; disposition of proceeds of sale; record keeping.

(a) When a final judgment is entered finding a defendant guilty of the commission or attempted commission of a crime against any person or guilty of the commission of a crime or delinquent act involving the illegal possession or carrying of a weapon, any device which was used as a weapon in the commission of the crime or delinquent act shall be turned over by the person having custody of the weapon or device to the sheriff, chief of police, or other executive officer of the law enforcement agency that originally confiscated the weapon or device when the weapon or device is no longer needed for evidentiary purposes. With the exception of firearms, as such term is defined in Code Section 17-5-51, which shall be disposed of in accordance with Code Section 17-5-52.1, within 90 days after receiving the weapon or device, the sheriff, chief of police, or other executive officer of the law enforcement agency shall retain the weapon or device for use in law enforcement, destroy the same, or sell the weapon or device pursuant to judicial sale as provided in Article 7 of Chapter 13 of Title 9 or by any commercially feasible means, provided that if the weapon or device used as a weapon in the crime is not the property of the defendant, there shall be no forfeiture of such weapon or device.

(b) The proceeds derived from all sales of such weapons or devices, after deducting the costs of the advertising and the sale, shall be turned in to the treasury of the county or the municipal corporation that sold the weapon or device. The proceeds derived from the sale of such weapons or devices confiscated by a state law enforcement agency shall be paid into the state treasury.

(c) Any law enforcement agency that retains, destroys, or sells any weapon or device pursuant to this Code section shall maintain records that include an accurate description of each weapon or device along with records of whether each weapon or device was retained, sold, or destroyed. (Ga. L. 1967, p. 749, § 3; Ga. L. 1976, p. 167, § 1; Ga. L. 1994, p. 963, § 2; Ga. L. 2008, p. 344, § 1/HB 333; Ga. L. 2012, p. 1285, § 3/SB 350.)

The 2012 amendment, effective May 3, 2012, in the second sentence of subsection (a), substituted "With the exception of firearms, as such term is defined in Code Section 17-5-51, which shall be disposed of

in accordance with Code Section 17-5-52.1, within" for "Within" at the beginning, and deleted a comma after "provided that" near the end.

17-5-52.1. Disposal of forfeited or abandoned firearms; innocent owners; auctions; record keeping; liability of government entities.

(a) As used in this Code section, the terms "firearm" and "innocent owner" shall have the same meaning as set forth in Code Section 17-5-51.

(b) Notwithstanding any other provision of law to the contrary and subject to the duty to return firearms to innocent owners pursuant to subsection (c) of Code Section 17-5-51 and this Code section, all firearms that are forfeited or abandoned to any law enforcement agency of this state or a political subdivision of this state, including the Department of Natural Resources, or that are otherwise acquired by the state or a political subdivision and are no longer needed, shall be disposed of as provided in this Code section.

(c) Prior to the disposal of any firearm that has been forfeited or abandoned to the state or a political subdivision of the state, the political subdivision or state custodial agency with possession of the firearm shall use its best efforts to determine if the firearm has been lost by, stolen from, or otherwise illegally obtained from an innocent owner and, if so, shall return the firearm to its innocent owner in accordance with Code Section 17-5-51.

(d) If an innocent owner of a firearm cannot be located or after proper notification he or she fails to pay for the return of his or her firearm, if the political subdivision is:

(1) A municipal corporation, it shall dispose of its firearms as provided for in Code Section 36-37-6; provided, however, that municipal corporations shall not have the right to reject any and all bids or to cancel any proposed sale of such firearms, and all sales shall be to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq., and Chapter 16 of Title 43 and who are authorized to receive such firearms under the terms of such license. Any political subdivision which disposes of firearms shall use proceeds from the sale of a firearm as are necessary to cover the costs of administering this Code section, with any surplus to be transferred to the general fund of the political subdivision; or

(2) Not a municipal corporation, the state custodial agency or the political subdivision shall dispose of its firearms by sale at public

auction to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq., and Chapter 16 of Title 43 and who are authorized to receive such firearms under the terms of such license. A state custodial agency shall retain only such proceeds as are necessary to cover the costs of administering this Code section, with any surplus to be transferred to the general fund of the state, provided that a state custodial agency may be reimbursed for any firearms formerly in use by the state custodial agency that are sold under this Code section.

(e) Auctions required by paragraph (2) of subsection (d) of this Code section may occur online on a rolling basis or at live events, but in no event shall such auctions occur less frequently than once every six months during any time in which the political subdivision or state custodial agency has an inventory of saleable firearms.

(f) The requirements of subsection (d) of this Code section shall not apply to a firearm if no bids from eligible recipients are received within six months from when bidding opened on such firearm or the sheriff, chief of police, agency director, or designee of such official certifies the firearm is unsafe for use because of wear, damage, age, or modification or because any federal or state law prohibits the sale or distribution of such firearm. Any such firearm shall, at the discretion of the sheriff, chief of police, agency director, or designee of such official, be transferred to the Division of Forensic Sciences of the Georgia Bureau of Investigation, a municipal or county law enforcement forensic laboratory for training or experimental purposes, or be destroyed.

(g) All agencies subject to the provisions of this Code section shall keep records of the firearms acquired and disposed of as provided by this Code section as well as records of the proceeds of the sales thereof and the disbursement of such proceeds in accordance with records retention schedules adopted in accordance with Article 5 of Chapter 18 of Title 50, the “Georgia Records Act.”

(h) Neither the state nor any political subdivision of the state nor any of its officers, agents, or employees shall be liable to any person, including the purchaser of a firearm, for personal injuries or damage to property arising from the sale of a firearm under this Code section unless the state or political subdivision acted with gross negligence or willful or wanton misconduct. (Code 1981, § 17-5-52.1, enacted by Ga. L. 2012, p. 1285, § 4/SB 350.)

Editor’s notes. — This Code section became effective May 3, 2012.

17-5-54. Disposition of personal property in custody of law enforcement agency.

(a)(1) Except as provided in Code Sections 17-5-55 and 17-5-56 and subsections (d), (e), and (f) of this Code section, when a law enforcement agency assumes custody of any personal property which is the subject of a crime or has been abandoned or is otherwise seized, a disposition of such property shall be made in accordance with the provisions of this Code section. When a final verdict and judgment is entered finding a defendant guilty of the commission of a crime, any personal property used as evidence in the trial shall be returned to the rightful owner of the property within 30 days following the final judgment; provided, however, that if the judgment is appealed or if the defendant files a motion for a new trial and if photographs, videotapes, or other identification or analysis of the personal property will not be sufficient evidence for the appeal of the case or new trial of the case, such personal property shall be returned to the rightful owner within 30 days of the conclusion of the appeal or new trial, whichever occurs last. All personal property in the custody of a law enforcement agency, including personal property used as evidence in a criminal trial, which is unclaimed after a period of 90 days following its seizure, or following the final verdict and judgment in the case of property used as evidence, and which is no longer needed in a criminal investigation or for evidentiary purposes in accordance with Code Section 17-5-55 or 17-5-56 shall be subject to disposition by the law enforcement agency. The sheriff, chief of police, or other executive officer of a law enforcement agency shall make application to the superior court for an order to retain, sell, or discard such property. In the application the officer shall state each item of personal property to be retained, sold, or discarded. Upon the superior court's granting an order for the law enforcement agency to retain such property, the law enforcement agency shall retain such property for official use. Upon the superior court's granting an order which authorizes that the property be discarded, the law enforcement agency shall dispose of the property as other salvage or nonserviceable equipment. Upon the superior court's granting an order for the sale of personal property, the officer shall provide for a notice to be placed once a week for four weeks in the legal organ of the county specifically describing each item and advising possible owners of items of the method of contacting the law enforcement agency; provided, however, that miscellaneous items having an estimated fair market value of \$75.00 or less may be advertised or sold, or both, in lots. Such notice shall also stipulate a date, time, and place said items will be placed for public sale if not claimed. Such notice shall also stipulate whether said items or groups of items are to be sold in blocks, by lot numbers, by entire list of items, or separately.

(2) Items not claimed by the owners shall be sold at a sale which shall be conducted not less than seven nor more than 15 days after the final advertised notice has been run. The sale shall be to the highest bidder.

(3) If property has not been bid on in two successive sales, the law enforcement agency may retain the property for official use or the property will be considered as salvage and disposed of as other county or municipal salvage or nonserviceable equipment.

(4) With respect to unclaimed perishable personal property or animals or other wildlife, the officer may make application to the superior court for an order authorizing the disposition of such property prior to the expiration of 90 days.

(5) With respect to a seized motor vehicle which is not the subject of forfeiture proceedings, the law enforcement agency shall be required to contact the Georgia Crime Information Center to determine if such motor vehicle has been stolen and to follow generally the procedures of Code Section 40-11-2 to ascertain the registered owner of such vehicle.

(b) Records will be maintained showing the manner in which each item came into possession of the law enforcement agency, a description of the property, all efforts to locate the owner, any case or docket number, the date of publication of any newspaper notices, and the date on which the property was retained by the law enforcement agency, sold, or discarded.

(c) The proceeds from the sale of personal property by the sheriff or other county law enforcement agency pursuant to this Code section shall be paid into the general fund of the county treasury. The proceeds from the sale of personal property by a municipal law enforcement agency pursuant to this Code section shall be paid into the general fund of the municipal treasury.

(d) The provisions of this Code section shall not apply to personal property which is the subject of forfeiture proceedings as otherwise provided by law.

(e) The provisions of this Code section shall not apply to any property which is the subject of a disposition pursuant to Code Sections 17-5-50 through 17-5-53.

(f) The provisions of this Code section shall not apply to any abandoned motor vehicle for which the provisions of Chapter 11 of Title 40 are applicable. (Code 1981, § 17-5-54, enacted by Ga. L. 1991, p. 944, § 1; Ga. L. 1995, p. 909, § 1; Ga. L. 2004, p. 575, § 1; Ga. L. 2012, p. 1285, § 5/SB 350.)

The 2012 amendment, effective May 3, 2012, added “within 30 days following the final judgment; provided, however, that if the judgment is appealed or if the defendant files a motion for a new trial and if photographs, videotapes, or other identification or analysis of the personal

property will not be sufficient evidence for the appeal of the case or new trial of the case, such personal property shall be returned to the rightful owner within 30 days of the conclusion of the appeal or new trial, whichever occurs last” at the end of the second sentence of paragraph (a)(1).

JUDICIAL DECISIONS

Destruction of cell phone did not violate due process rights. — Court of appeals erred in affirming an order dismissing an indictment against the defendant on the ground that the state destroyed the defendant’s cell phone in violation of O.C.G.A. § 17-5-54 because the defendant failed to show a violation of due process since there were no circumstances from which it could be concluded that the exculpatory value of the cell phone was obvious or evident to police or any other state actor before the phone was

destroyed; the cell phone was initially seized because police believed that the phone was potentially inculpatory for possible use by the state at trial, and since the scenario did not permit the conclusion that it was apparent to police or anyone else involved in the seizure, custody, or disposition of the cell phone that the phone could possibly aid the defendant in the defense of any criminal charges, the evidence was not constitutionally material. *State v. Miller*, 287 Ga. 748, 699 S.E.2d 316 (2010).

17-5-55. Designation of custodian for introduced evidence; evidence log; storage, maintenance, and disposal of evidence.

JUDICIAL DECISIONS

Failure to comply with § 17-5-55. — No compliance with O.C.G.A. § 17-5-55 was indicated because neither the original nor a copy of a videotaped forensic interview of a child molestation victim was included in the record on appeal from the trial court, and the record did not reflect that the trial court designated a custodian of the evidence or that any evidence log was maintained; when it appears that photographs or audio or video recordings might be needed on appeal by a party, such party should move the trial court to allow duplicates to be admitted into the

record in addition to the originals and be retained by the clerk of the court for inclusion in any appellate record, and the trial court should include in the court’s order, instructions that the clerk of court include such copies in the appellate record transmitted to the appellate court, when the appealing party either requests their inclusion or requests that nothing be omitted from the record on appeal because such a practice would ensure the completeness of the appellate record without delay. *Lynn v. State*, 300 Ga. App. 170, 684 S.E.2d 325 (2009).

17-5-56. Maintenance of physical evidence containing biological material.

(a) Except as otherwise provided in Code Section 17-5-55, on or after May 27, 2003, governmental entities in possession of any physical evidence in a criminal case, including, but not limited to, a law enforcement agency or a prosecuting attorney, shall maintain any physical evidence collected at the time of the crime that contains

biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime as provided in this Code section. Biological samples collected directly from any person for use as reference materials for testing or collected for the purpose of drug or alcohol testing shall not be preserved.

(b) In a case in which the death penalty is imposed, the evidence shall be maintained until the sentence in the case has been carried out. Evidence in all felony cases that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime shall be maintained for the period of time that the crime remains unsolved or until the sentence in the case is completed, whichever occurs last. (Code 1981, § 17-5-56, enacted by Ga. L. 2003, p. 247, § 3; Ga. L. 2008, p. 486, § 2/HB 1297; Ga. L. 2011, p. 264, § 1-3/SB 80.)

The 2011 amendment, effective May 11, 2011, in subsection (b), rewrote the second and third sentences, which read: "In a case that involves the prosecution of a serious violent felony as defined by Code Section 17-10-6.1, a violation of Code Section 16-6-5.1, or sodomy, statutory rape, child molestation, bestiality, incest, or sexual battery as those terms are defined in Chapter 6 of Title 16, the evidence that contains biological material, including, but not limited to, stains, fluids, or hair

samples that relate to the identity of the perpetrator of the crime shall be maintained for ten years after judgment in the criminal case becomes final or ten years after May 27, 2003, whichever is later. Evidence in all other felony and misdemeanor cases may be purged."

Editor's notes. — Ga. L. 2011, p. 264, § 1-1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Johnia Berry Act.'"

JUDICIAL DECISIONS

Duty of state. — State did not violate O.C.G.A. § 17-5-56(a) by failing to preserve material evidence when, following a single-car accident involving the defendant's car, the state removed samples of biological evidence from the interior of the defendant's car and sold the defendant's car to a salvage wholesaler who then sold the car to a mechanic, who cleaned, repaired, repainted, and resold the vehicle. *State v. Mussman*, 289 Ga. 586, 713 S.E.2d 822 (2011).

State was not obligated under O.C.G.A. § 17-5-56(a) to preserve four vials of the defendant's blood that were drawn as reference samples for DNA analysis. Even assuming the defendant's motion challenging the admissibility of the defendant's statements put the state on notice that the defendant's level of intoxication was an issue in determining whether the statements to law enforcement officers

were voluntary, it did not indicate that the defendant was claiming that intoxication made defendant physically incapable of committing the crimes and, thus, the defendant could not have been the perpetrator. *Clay v. State*, 725 S.E.2d 260, No. S11A1956, 2012 Ga. LEXIS 301 (2012).

Cigarette butts not constitutionally material. — Defendant did not show that the cigarette butts found in the dumpster were constitutionally material to the defendant's defense because although the butts were potentially useful to the defense the defendant raised in the custodial statement and at trial, that another person committed the crimes, that did not establish that the butts had an obvious or readily perceived exculpatory value, and the court's conclusion that the cigarette butts had apparent exculpatory value to that defense was not supported by the record because the DNA testing could

have been exculpatory or inculpatory. Therefore, the lost cigarette butts were not constitutionally material and the trial court erred in granting the defendant's motion to dismiss the indictment based on

the failure to preserve the cigarette butts found in the dumpster in violation of O.C.G.A. § 17-5-56(a). *State v. Mizell*, 288 Ga. 474, 705 S.E.2d 154 (2010).

ARTICLE 4

INVESTIGATING SEXUAL ASSAULT

17-5-72. Right to free forensic medical examination.

A victim shall have the right to have a forensic medical examination regardless of whether the victim participates in the criminal justice system or cooperates with law enforcement in pursuing prosecution of the underlying crime. A victim shall not be required to pay, directly or indirectly, for the cost of a forensic medical examination. The cost of a forensic medical examination shall be paid for by the Georgia Crime Victims Emergency Fund, as provided for in Chapter 15 of this title. (Code 1981, § 17-5-72, enacted by Ga. L. 2008, p. 486, § 3/HB 1297; Ga. L. 2011, p. 214, § 3/HB 503.)

The 2011 amendment, effective July 1, 2011, substituted "Georgia Crime Victims Emergency Fund, as provided for in

Chapter 15 of this title" for "investigating law enforcement agency" at the end of the last sentence.

ARTICLE 5

IMMIGRANTS

Effective date. — This article became effective July 1, 2011. See editor's note for applicability.

Cross references. — Offenses involving illegal aliens, § 16-11-200 et seq. Cooperation of Georgia law enforcement with federal immigration authorities, § 35-1-6. Secure and verifiable identity document act, § 50-36-2. Immigration enforcement review board, § 50-36-3.

Editor's notes. — Ga. L. 2011, p. 794, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21, not codified by the General Assembly, provides that: "(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the other provisions

or applications of this Act or any other part of this Act than can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

"(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22, not codified by the General Assembly, provides, in part, that this article shall apply to offenses and violations occurring on or after July 1, 2011.

Law reviews. — For article on the 2011 enactment of this article, 28 Ga. St. U. L. Rev. 35 (2011).

For comment, "Immigration Detention

Reform: No Band Aid Desired,” see 60
Emory L. J. 1211 (2011).

17-5-100. Investigation of illegal alien status.

(a) As used in this Code section, the term:

(1) “Criminal violation” means a violation of state or federal criminal law but shall not include a violation of a county or municipal law, regulation, or ordinance.

(2) “Illegal alien” means a person who is verified by the federal government to be present in the United States in violation of federal immigration law.

(b) Except as provided in subsection (f) of this Code section, during any investigation of a criminal suspect by a peace officer, when such officer has probable cause to believe that a suspect has committed a criminal violation, the officer shall be authorized to seek to verify such suspect’s immigration status when the suspect is unable to provide one of the following:

(1) A secure and verifiable document as defined in Code Section 50-36-2;

(2) A valid Georgia driver’s license;

(3) A valid Georgia identification card issued by the Department of Driver Services;

(4) If the entity requires proof of legal presence in the United States before issuance, any valid driver’s license from a state or district of the United States or any valid identification document issued by the United States federal government;

(5) A document used in compliance with paragraph (2) of subsection (a) of Code Section 40-5-21; or

(6) Other information as to the suspect’s identity that is sufficient to allow the peace officer to independently identify the suspect.

(c) When attempting to determine the immigration status of a suspect pursuant to subsection (b) of this Code section, a peace officer shall be authorized to use any reasonable means available to determine the immigration status of the suspect, including:

(1) Use of any authorized federal identification data base;

(2) Identification methods authorized by federal law, including those authorized by 8 U.S.C.A. Section 1373(c) and 8 U.S.C.A. Section 1644;

(3) Use of electronic fingerprint readers or similar devices; or

(4) Contacting an appropriate federal agency.

(d) A peace officer shall not consider race, color, or national origin in implementing the requirements of this Code section except to the extent permitted by the Constitutions of Georgia and of the United States.

(e) If during the course of the investigation into such suspect's identity, a peace officer receives verification that such suspect is an illegal alien, then such peace officer may take any action authorized by state and federal law, including, but not limited to, detaining such suspected illegal alien, securely transporting such suspect to any authorized federal or state detention facility, or notifying the United States Department of Homeland Security or successor agency. Nothing in this Code section shall be construed to hinder or prevent a peace officer or law enforcement agency from arresting or detaining any criminal suspect on other criminal charges.

(f) No person who in good faith contacts or has contact with a state or local peace officer or prosecuting attorney or member of the staff of a prosecuting attorney for the purpose of acting as a witness to a crime, to report criminal activity, or to seek assistance as a victim to a crime shall have his or her immigration status investigated based on such contact or based on information arising from such contact.

(g) A peace officer, prosecuting attorney, or government official or employee, acting in good faith to carry out any provision of this Code section, shall have immunity from damages or liability from such actions. (Code 1981, § 17-5-100, enacted by Ga. L. 2011, p. 794, § 8/HB 87; Ga. L. 2012, p. 775, § 17/HB 942.)

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, substituted “8 U.S.C.A. Section 1373(c) and 8 U.S.C.A. Section 1644” for “8 USCA 1373(c), 8 USCA 1644” in paragraph (c)(2).

Law reviews. — For article, “State Government: Illegal Immigration Reform and Enforcement Act of 2011,” see 28 Ga. St. U. L. Rev. 51 (2011).

CHAPTER 6

BONDS AND RECOGNIZANCES

Article 1		Sec.	
General Provisions			
Sec.		17-6-1.1.	dure; schedule of bails; appeal bonds.
17-6-1.	Where offenses bailable; proce-		Electronic pretrial release and monitoring program for defen-

Sec.

17-6-5.

dants; requirements; procedures; fees.

Acceptance of cash bonds for violations of laws pertaining to traffic, motor vehicles, motor common carriers, motor contract carriers, hazardous materials transportation, road taxes on motor carriers, game, fish, boating, or litter; authorization.

17-6-8.

Acceptance of cash bonds for traffic, motor vehicle, motor common carrier, motor contract carrier, hazardous material transportation, game, fish, boating, or litter law violations — Proceedings upon failure of person arrested to appear; forfeiture of bond not a bar to subsequent prosecution.

17-6-11.

Display of driver's license for violation of traffic, motor vehicle, motor common carrier, motor contract carrier, commercial vehicle, hazardous materials, or road tax on motor carrier laws in lieu of bail, recognizance, or incarceration;

Sec.

17-6-12.

suspension of license; organ donation; arrest; seizure of license.

Discretion of court to release person charged with crime on person's own recognizance only; effect of failure of person charged to appear for trial.

Article 2

Sureties

PART 2

PROFESSIONAL BONDSMEN

17-6-50.

Persons deemed professional bondsmen; criminal background investigation information to be provided to clerk of court.

Article 3

Proceedings for Forfeiture of Bonds or Recognizances

17-6-71.

Execution hearing on failure of principal to appear.

17-6-72.

Conditions not warranting forfeiture of bond for failure to appear; remission of forfeiture.

ARTICLE 1

GENERAL PROVISIONS

17-6-1. Where offenses bailable; procedure; schedule of bails; appeal bonds.

(a) The following offenses are bailable only before a judge of the superior court:

- (1) Treason;
- (2) Murder;
- (3) Rape;
- (4) Aggravated sodomy;
- (5) Armed robbery;
- (6) Aircraft hijacking and hijacking a motor vehicle;
- (7) Aggravated child molestation;
- (8) Aggravated sexual battery;

(9) Manufacturing, distributing, delivering, dispensing, administering, or selling any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II;

(10) Violating Code Section 16-13-31 or Code Section 16-13-31.1;

(11) Kidnapping, arson, aggravated assault, or burglary in any degree if the person, at the time of the alleged kidnapping, arson, aggravated assault, or burglary in any degree, had previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (10) of this subsection;

(12) Aggravated stalking; and

(13) Violations of Chapter 15 of Title 16.

(b)(1) All offenses not included in subsection (a) of this Code section are bailable by a court of inquiry. Except as provided in subsection (g) of this Code section, at no time, either before a court of inquiry, when indicted or accused, after a motion for new trial is made, or while an appeal is pending, shall any person charged with a misdemeanor be refused bail.

(2) Except as otherwise provided in this chapter:

(A) A person charged with violating Code Section 40-6-391 whose alcohol concentration at the time of arrest, as determined by any method authorized by law, violates that provided in paragraph (5) of subsection (a) of Code Section 40-6-391 may be detained for a period of time up to six hours after booking and prior to being released on bail or on recognizance; and

(B) When an arrest is made by a law enforcement officer without a warrant upon an act of family violence pursuant to Code Section 17-4-20, the person charged with the offense shall not be eligible for bail prior to the arresting officer or some other law enforcement officer taking the arrested person before a judicial officer pursuant to Code Section 17-4-21.

(3)(A) Notwithstanding any other provision of law, a judge of a court of inquiry may, as a condition of bail or other pretrial release of a person who is charged with violating Code Section 16-5-90 or 16-5-91, prohibit the defendant from entering or remaining present at the victim's school, place of employment, or other specified places at times when the victim is present or intentionally following such person.

(B) If the evidence shows that the defendant has previously violated the conditions of pretrial release or probation or parole

which arose out of a violation of Code Section 16-5-90 or 16-5-91, the judge of a court of inquiry may impose such restrictions on the defendant which may be necessary to deter further stalking of the victim, including but not limited to denying bail or pretrial release.

(c)(1) In the event a person is detained in a facility other than a municipal jail for an offense which is bailable only before a judge of the superior court, as provided in subsection (a) of this Code section, and a hearing is held pursuant to Code Section 17-4-26 or 17-4-62, the presiding judicial officer shall notify the superior court in writing within 48 hours that the arrested person is being held without bail. If the detained person has not already petitioned for bail as provided in subsection (d) of this Code section, the superior court shall notify the district attorney and shall set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(2) In the event a person is detained in a municipal jail for an offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section for a period of 30 days, the municipal court shall notify the superior court in writing within 48 hours that the arrested person has been held for such time without bail. If the detained person has not already petitioned for bail as provided in subsection (d) of this Code section, the superior court shall notify the district attorney and set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(3) Notice sent to the superior court pursuant to paragraph (1) or (2) of this subsection shall include any incident reports and criminal history reports relevant to the detention of such person.

(d) A person charged with any offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section may petition the superior court requesting that such person be released on bail. The court shall notify the district attorney and set a date for a hearing within ten days after receipt of such petition.

(e) A court shall be authorized to release a person on bail if the court finds that the person:

(1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required;

(2) Poses no significant threat or danger to any person, to the community, or to any property in the community;

(3) Poses no significant risk of committing any felony pending trial; and

(4) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

However, if the person is charged with a serious violent felony and has already been convicted of a serious violent felony, or of an offense under the laws of any other state or of the United States which offense if committed in this state would be a serious violent felony, there shall be a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person as required or assure the safety of any other person or the community. As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in Code Section 17-10-6.1.

(f)(1) Except as provided in subsection (a) of this Code section or as otherwise provided in this subsection, the judge of any court of inquiry may by written order establish a schedule of bails and unless otherwise ordered by the judge of any court, a person charged with committing any offense shall be released from custody upon posting bail as fixed in the schedule.

(2) For offenses involving an act of family violence, as defined in Code Section 19-13-1, the schedule of bails provided for in paragraph (1) of this subsection shall require increased bail and shall include a listing of specific conditions which shall include, but not be limited to, having no contact of any kind or character with the victim or any member of the victim's family or household, not physically abusing or threatening to physically abuse the victim, the immediate enrollment in and participation in domestic violence counseling, substance abuse therapy, or other therapeutic requirements.

(3) For offenses involving an act of family violence, the judge shall determine whether the schedule of bails and one or more of its specific conditions shall be used, except that any offense involving an act of family violence and serious injury to the victim shall be bailable only before a judge when the judge or the arresting officer is of the opinion that the danger of further violence to or harassment or intimidation of the victim is such as to make it desirable that the consideration of the imposition of additional conditions as authorized in this Code section should be made. Upon setting bail in any case involving family violence, the judge shall give particular consideration to the exigencies of the case at hand and shall impose any specific conditions as he or she may deem necessary. As used in this Code section, the term "serious injury" means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, substantial bruises to body parts, fractured bones, or permanent disfigurements and wounds inflicted by deadly weapons or any other objects which, when used offensively against a person, are capable of causing serious bodily injury.

(4) For violations of Code Section 16-15-4, the court shall require increased bail and shall include as a condition of bail or pretrial

release that the defendant shall not have contact of any kind or character with any other member or associate of a criminal street gang and, in cases involving a victim, that the defendant shall not have contact of any kind or character with any such victim or any member of any such victim's family or household.

(5) For offenses involving violations of Code Section 40-6-393, bail or other release from custody shall be set by a judge on an individual basis and not a schedule of bails pursuant to this Code section.

(g) No appeal bond shall be granted to any person who has been convicted of murder, rape, aggravated sodomy, armed robbery, aggravated child molestation, child molestation, kidnapping, trafficking in cocaine or marijuana, aggravated stalking, or aircraft hijacking and who has been sentenced to serve a period of incarceration of five years or more. The granting of an appeal bond to a person who has been convicted of any other felony offense or of any misdemeanor offense involving an act of family violence as defined in Code Section 19-13-1, or of any offense delineated as a high and aggravated misdemeanor or of any offense set forth in Code Section 40-6-391, shall be in the discretion of the convicting court. Appeal bonds shall terminate when the right of appeal terminates, and such bonds shall not be effective as to any petition or application for writ of certiorari unless the court in which the petition or application is filed so specifies.

(h) Except in cases in which life imprisonment or the death penalty may be imposed, a judge of the superior court by written order may delegate the authority provided for in this Code section to any judge of any court of inquiry within such superior court judge's circuit. However, such authority may not be exercised outside the county in which said judge of the court of inquiry was appointed or elected. The written order delegating such authority shall be valid for a period of one year, but may be revoked by the superior court judge issuing such order at any time prior to the end of that one-year period.

(i) As used in this Code section, the term "bail" shall include the releasing of a person on such person's own recognizance, except as limited by the provisions of Code Section 17-6-12.

(j) For all persons who have been authorized by law or the court to be released on bail, sheriffs and constables shall accept such bail; provided, however, that the sureties tendered and offered on the bond are approved by the sheriff of the county in which the offense was committed. (Orig. Code 1863, § 4625; Code 1868, § 4649; Code 1873, § 4747; Code 1882, § 4747; Penal Code 1895, § 933; Penal Code 1910, § 958; Ga. L. 1922, p. 51, § 1; Code 1933, § 27-901; Ga. L. 1973, p. 454, § 1; Ga. L. 1980, p. 1359, § 1; Ga. L. 1982, p. 910, § 1; Ga. L. 1983, p. 3, § 14; Ga. L. 1983, p. 358, § 1; Ga. L. 1983, p. 452, § 1; Ga. L. 1984,

p. 22, § 17; Ga. L. 1984, p. 679, § 1; Ga. L. 1984, p. 760, § 1; Ga. L. 1985, p. 416, § 1; Ga. L. 1986, p. 166, §§ 1, 2; Ga. L. 1988, p. 358, § 1; Ga. L. 1989, p. 1714, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 416, § 1; Ga. L. 1991, p. 1401, § 1; Ga. L. 1992, p. 1150, § 1; Ga. L. 1992, p. 2527, § 1; Ga. L. 1993, p. 91, § 17; Ga. L. 1993, p. 1534, § 2; Ga. L. 1994, p. 532, § 1; Ga. L. 1994, p. 1270, § .5; Ga. L. 1994, p. 1625, § 5; Ga. L. 1995, p. 379, §§ 1, 2; Ga. L. 1995, p. 989, §§ 1, 2; Ga. L. 1996, p. 1233, § 1; Ga. L. 1996, p. 1624, § 1; Ga. L. 1997, p. 143, § 17; Ga. L. 1998, p. 270, § 9; Ga. L. 1999, p. 391, § 3; Ga. L. 2000, p. 1171, § 1; Ga. L. 2006, p. 379, § 18/ HB 1059; Ga. L. 2008, p. 817, § 1/ HB 960; Ga. L. 2010, p. 226, § 1/ HB 889; Ga. L. 2010, p. 230, §§ 8, 9/ HB 1015; Ga. L. 2012, p. 899, § 8-8/ HB 1176.)

The 2010 amendments. — The first 2010 amendment, effective July 1, 2010, added the exception at the end of subsection (i). The second 2010 amendment, effective July 1, 2010, in subsection (a), deleted “and” at the end of paragraph (a)(11), substituted “; and” for the period at the end of paragraph (a)(12), and added paragraph (a)(13); and, in paragraph (f)(4), substituted “For violations of Code Section 16-15-4” for “If probable cause is shown that the offense charged is in furtherance of a pattern of criminal gang activity as defined by Code Section 16-15-3” at the beginning, inserted “; in cases involving a victim,” and substituted “any such” for “the” twice near the end.

The 2012 amendment, effective July 1, 2012, inserted “in any degree” following “burglary” three times in paragraph (a)(11). See editor’s note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, “Chapter 15 of Title 16” was substituted for “the ‘Georgia Street Gang Terrorism and Prevention Act’” in paragraph (a)(13).

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/ HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

JUDICIAL DECISIONS

ANALYSIS

DISCRETION OF COURT PRACTICE AND PROCEDURE

Discretion of Court

Denial of bail not an abuse of discretion. — Petitioner charged with 16 counts of violating the Georgia RICO Act, O.C.G.A. § 16-14-1, securities fraud, and theft, who owned no assets in the United States and had allegedly funneled significant assets to Belize, where petitioner traveled frequently, was not entitled to bail as of right under O.C.G.A.

§ 17-6-1(a), Ga. Const. 1983, Art. I, Sec. I, Para. XVII, or U.S. Const., amend. VIII. *Constantino v. Warren*, 285 Ga. 851, 684 S.E.2d 601 (2009).

Practice and Procedure

Bond conditions did not constitute criminal punishment for double jeopardy purposes.

Conducting a hearing to modify the bond conditions of a third-time DUI of-

fender and placing limitations upon the offender's driving privileges, predicated upon the necessity to protect the welfare and safety of the citizens of Georgia from a recidivist offender, was not punishment, nor was the hearing prosecution, for the purposes of double jeopardy. *Strickland v. State*, 300 Ga. App. 898, 686 S.E.2d 486 (2009).

Considering the nature of the defendant's arrest and charges, the amount and conditions of the defendant's bond, which included home confinement, drug and alcohol evaluation and counseling, installa-

tion of an ignition interlock device on the defendant's vehicle, and a SCRAM bracelet, were not punishment for purposes of double jeopardy; instead, the conditions were rationally related to an alternative purpose, as the conditions were designed to prevent the defendant from being a danger to the community by committing future acts of driving under the influence while awaiting trial and to assure defendant's presence at court proceedings. *Allden v. State*, 314 Ga. App. 439, 724 S.E.2d 451 (2012).

17-6-1.1. Electronic pretrial release and monitoring program for defendants; requirements; procedures; fees.

(a) In addition to other methods of posting bail or as special condition of bond, a defendant may be released from custody pending the trial of his or her case on the condition that the defendant comply with the terms and conditions of an electronic pretrial release and monitoring program which is approved pursuant to subsection (j) of this Code section. The sheriff of a county may enter into agreements with such approved providers. A bonding company, bonding agent, or probation service provider may be a provider of such services.

(b) If it appears to the court that a defendant subject to its jurisdiction is a suitable candidate for electronic pretrial release and monitoring, the court may, in its sole discretion and subject to the eligibility requirements of this Code section, authorize the defendant to be released under the provisions of an electronic pretrial release and monitoring program. A judge may only authorize electronic pretrial release and monitoring if that judge has jurisdiction to set a bond for the offense charged and the defendant is otherwise eligible for bond under subsection (e) of Code Section 17-6-1. When a court of competent jurisdiction has already set bond for a defendant indicating that the defendant is otherwise eligible for release on bail pursuant to subsection (e) of Code Section 17-6-1, in addition to accepting cash in satisfaction of the bond set by a court, the court may instruct the sheriff that the defendant is to be released to an electronic pretrial release and monitoring program.

(c) The court, in its sole discretion, may revoke at any time the eligibility of any defendant to participate in the electronic pretrial release and monitoring program in which event the defendant shall be immediately returned to custody. If the defendant's case has not been assigned to a particular division of the court, the chief judge shall have such authority.

(d) A defendant may not be released to, or remain in, an electronic pretrial release and monitoring program who has any other outstanding warrants, accusations, indictments, holds, or incarceration orders from any other court, law enforcement agency, or probation or parole officer that require the posting of bond or further adjudication.

(e) A defendant released pursuant to an electronic pretrial release and monitoring program shall abide by such conditions as the court may impose relating to such program, including, but not limited to, the following:

- (1) Periods of home confinement;
- (2) Compliance with all requirements and conditions of the electronic pretrial release and monitoring program provider;
- (3) Compliance with any court orders or special conditions of bond which may include an order directing that no contact, direct or indirect, be made with the victim or forbidding entry upon, about, or near certain premises;
- (4) An order directing that the accused provide support and maintenance for the person's dependents to the best of his or her ability;
- (5) Restrictions on the use of alcoholic beverages and controlled substances;
- (6) Curfews;
- (7) Limitations on work hours and employment;
- (8) An order directing the accused to submit to test of breath, blood, or urine from time to time;
- (9) Travel restrictions;
- (10) An order directing that electronic pretrial release and monitoring equipment be kept in good working condition;
- (11) An order directing that the person refrain from violating the criminal laws of any state, county, or municipality;
- (12) An order directing timely payment of all fees connected with the electronic pretrial release and monitoring program;
- (13) Payroll deductions to fund electronic pretrial release and monitoring fees;
- (14) Provisions to permit reasonable medical treatment;
- (15) Provisions for procuring reasonable necessities, such as grocery shopping;

(16) Provisions for attendance in educational, rehabilitative, and treatment programs; and

(17) Such other terms and conditions as the court may deem just and proper.

(f) Under no circumstances shall electronic pretrial release and monitoring equipment be introduced internally or beneath the skin of any person.

(g) In the event that a court of competent jurisdiction finds probable cause, upon oath, affirmation, or sworn affidavit, that a defendant has violated the terms or conditions of his or her electronic pretrial release and monitoring program, other than terms regarding home confinement set forth in paragraph (1) of subsection (e) of this Code section, or finds that the defendant provided false or misleading information concerning his or her qualifications to participate in the electronic pretrial release and monitoring program, including, but not limited to, name, date of birth, address, or other personal identification information, then the defendant's ongoing participation in such program shall be terminated immediately and, upon arrest of the defendant for such violation by any law enforcement officer, the defendant shall be returned to confinement at the county jail or other facility from which the defendant was released.

(h)(1) As an additional condition of electronic pretrial release and monitoring, a defendant authorized to participate in such program by the court shall pay a reasonable, nonrefundable fee for program enrollment, equipment use, and monitoring to the provider of such program. If a bonding company, bonding agent, or probation service provider is the provider, the fees earned in the capacity of being such a provider shall be in addition to the fees allowed in Code Sections 17-6-30, 42-8-34, and 42-8-100.

(2) The fees connected with the electronic pretrial release and monitoring program shall be timely paid by a defendant as a condition of his or her ongoing participation in the electronic pretrial release and monitoring program in accordance with the terms for such programs as approved by the court. Failure to make timely payments shall constitute a violation of the terms of the electronic pretrial release and monitoring program and shall result in the defendant's immediate return to custody.

(3) Defendants who have an extraordinary medical condition requiring ongoing medical treatment or indigent persons, as defined by the court, and who are selected by the court following the indigency standards established by the court may have such electronic pretrial release and monitoring fees paid by the sheriff with the consent of the governing authority.

(i) No defendant released under an electronic pretrial release and monitoring program under this Code section shall be deemed to be an agent, employee, or involuntary servant of the county or the electronic pretrial release and monitoring provider while so released, working, or participating in training or going to and from the defendant's place of employment or training. Neither the electronic pretrial release and monitoring provider nor the sheriff shall be civilly liable for the criminal acts of a defendant released pursuant to this Code section.

(j) Any person or corporation approved by the chief judge of the court and the sheriff in their discretion who meets the following minimum requirements may be approved to provide electronic pretrial release and monitoring services:

(1) The provider shall comply with all applicable federal, state, and local laws and all rules and regulations established by the chief judge and the sheriff in counties where the provider provides electronic pretrial release and monitoring services;

(2) The provider shall provide the chief judge and the sheriff with the name of the provider, the name of an individual who shall serve as the contact person for the provider, and the telephone number of such contact person;

(3) The provider shall promptly, not later than three business days after such change, notify the chief judge and sheriff of any changes in its address, ownership, or qualifications under this Code section;

(4) The provider shall provide simultaneous access to all records regarding all monitoring information, GPS tracking, home confinement, and victim protection regarding each person placed on electronic pretrial release and monitoring; and

(5) The provider shall act as surety for the bond.

(k) The sheriff shall maintain a list of approved providers of electronic pretrial release and monitoring services. The sheriff, in his or her discretion, may temporarily or permanently remove any provider from the list of approved providers should the provider:

(1) Fail to comply with the requirements of this Code section;

(2) Fail to monitor properly any defendant that the provider was required to monitor;

(3) Charge an excessive fee for use and monitoring of electronic monitoring equipment; or

(4) Act or fail to act in such a manner that, in the discretion of the sheriff, constitutes good cause for removal. (Code 1981, § 17-6-1.1, enacted by Ga. L. 2009, p. 691, § 2/HB 306.)

Effective date. — This Code section became effective July 1, 2009.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, “condition” was substituted for “conditions” in paragraph (h)(3).

Editor’s notes. — Ga. L. 2009, p. 691, § 1, not codified by the General Assembly, provides that: “The General Assembly finds that a program of electronic pretrial release, monitoring, and home confinement incorporates modern technology to accomplish the following purposes, including, but not limited to:

“(1) Ensuring proper prioritization of local incarceration resources;

“(2) Improving child support collections by giving nonpayors an opportunity to maintain employment while under electronic surveillance;

“(3) Better protecting crime victims by global positioning satellite (GPS) tracking and monitoring of pretrial release offenders to better ensure ongoing protection of crime victims;

“(4) Permitting defendants with extraordinary health problems to seek appropriate medical care;

“(5) Assisting sheriffs in alleviating jail overcrowding by creating alternative methods of pretrial release and monitoring and home confinement;

“(6) Reducing the costs of pretrial detention to governing authorities of counties as the costs of self-paid, electronic pretrial release and monitoring are substantially less than pretrial incarceration; and

“(7) Creating instant alert capabilities to law enforcement in the event terms of pretrial release are violated.”

17-6-4. Authorization of posting of cash bonds generally; furnishing of receipt to person posting bond; recordation of receipt of bond on docket; disposal of unclaimed bonds.

JUDICIAL DECISIONS

Cited in *Roscoe v. State*, 286 Ga. 325, 687 S.E.2d 455 (2009).

17-6-5. Acceptance of cash bonds for violations of laws pertaining to traffic, motor vehicles, motor common carriers, motor contract carriers, hazardous materials transportation, road taxes on motor carriers, game, fish, boating, or litter; authorization.

Any sheriff, deputy sheriff, county peace officer, or other county officer charged with the duty of enforcing the laws of this state relating to:

(1) Traffic or the operation or licensing of motor vehicles or operators;

(2) The width, height, or length of vehicles and loads;

(3) Motor common carriers and motor contract carriers;

(4) Commercial vehicle or driver safety;

(5) Hazardous materials transportation;

(6) Motor carrier insurance or registration;

(7) Road taxes on motor carriers as provided in Article 2 of Chapter 9 of Title 48;

- (8) Game and fish;
- (9) Boating; or
- (10) Litter control

who makes an arrest outside the corporate limits of any municipality of this state for a violation of said laws and who is authorized, as provided herein by a court of record having jurisdiction over such offenses, to accept cash bonds may accept a cash bond from the person arrested in lieu of a statutory bond or recognizance. No such officer shall accept a cash bond unless he or she is authorized to receive cash bonds in such cases by an order of the court having jurisdiction over such offenses and unless such order has been entered on the minutes of the court. Any such order may be granted, revoked, or modified by the court at any time. (Ga. L. 1953, Jan.-Feb. Sess., p. 331, § 1; Ga. L. 1962, p. 530, § 1; Ga. L. 1975, p. 845, § 1; Ga. L. 1982, p. 1136, §§ 1, 4; Ga. L. 2011, p. 479, § 2/HB 112.)

The 2011 amendment, effective July 1, 2011, added a colon at the end of the introductory paragraph; redesignated the existing language as individual paragraphs and made related capitalization

changes; added paragraphs (4) through (6); redesignated former paragraphs (4) through (7) as present paragraphs (7) through (10), respectively; and inserted “or she” in the next to the last sentence.

17-6-8. Acceptance of cash bonds for traffic, motor vehicle, motor common carrier, motor contract carrier, hazardous material transportation, game, fish, boating, or litter law violations — Proceedings upon failure of person arrested to appear; forfeiture of bond not a bar to subsequent prosecution.

If any person arrested for a misdemeanor arising out of a violation of the laws of this state relating to:

- (1) Traffic or the operation or licensing of motor vehicles or operators;
- (2) The width, height, or length of vehicles and loads;
- (3) Motor common carriers and motor contract carriers;
- (4) Commercial vehicle or driver safety;
- (5) Hazardous materials transportation;
- (6) Motor carrier insurance or registration;
- (7) Road taxes on motor carriers as provided in Article 2 of Chapter 9 of Title 48;
- (8) Game and fish;

(9) Boating; or

(10) Litter control

gives a cash bond for his or her appearance as provided in Code Section 17-6-5 and fails to appear on the date, time, and place specified in the citation or summons without legal excuse, the court may order said cash bond forfeited without the necessity of complying with the statutory procedure provided for in the forfeiture of statutory bail bonds. A judgment ordering the case disposed of and settled may be entered by the court and the proceeds shall be applied in the same manner as fines. If the court does not enter a judgment ordering the case disposed of and settled, the forfeiture of the cash bond shall not be a bar to subsequent prosecution of the person charged with the violation of such laws. (Ga. L. 1953, Jan.-Feb. Sess., p. 331, § 4; Ga. L. 1962, p. 530, § 2; Ga. L. 1975, p. 845, § 2; Ga. L. 1982, p. 1136, §§ 2, 5; Ga. L. 2011, p. 479, § 3/HB 112.)

The 2011 amendment, effective July 1, 2011, added a colon at the end of the introductory paragraph; redesignated the existing language as individual paragraphs and made related capitalization changes; added paragraphs (4) through

(6); redesignated former paragraphs (4) through (7) as present paragraphs (7) through (10), respectively; and inserted “or her” near the beginning of the ending undesignated paragraph.

17-6-11. Display of driver’s license for violation of traffic, motor vehicle, motor common carrier, motor contract carrier, commercial vehicle, hazardous materials, or road tax on motor carrier laws in lieu of bail, recognizance, or incarceration; suspension of license; organ donation; arrest; seizure of license.

(a) Any other laws to the contrary notwithstanding, any person who is apprehended by an officer for the violation of the laws of this state or ordinances relating to:

(1) Traffic, including any offense under Code Section 40-5-72 or 40-6-10, but excepting any other offense for which a license may be suspended for a first offense by the commissioner of driver services, any offense covered under Code Section 40-5-54, or any offense covered under Article 15 of Chapter 6 of Title 40;

(2) The licensing and registration of motor vehicles and operators;

(3) The width, height, and length of vehicles and loads;

(4) Motor common carriers and motor contract carriers;

(5) Commercial vehicle or driver safety;

(6) Hazardous materials transportation;

(7) Motor carrier insurance or registration; or

(8) Road taxes on motor carriers as provided in Article 2 of Chapter 9 of Title 48

upon being served with the official summons issued by such apprehending officer, in lieu of being immediately brought before the proper magistrate, recorder, or other judicial officer to enter into a formal recognizance or make direct the deposit of a proper sum of money in lieu of a recognizance ordering incarceration, may display his or her driver's license to the apprehending officer in lieu of bail, in lieu of entering into a recognizance for his or her appearance for trial as set in the aforesaid summons, or in lieu of being incarcerated by the apprehending officer and held for further action by the appropriate judicial officer. The apprehending officer shall note the driver's license number on the official summons. The summons duly served as provided in this Code section shall give the judicial officer jurisdiction to dispose of the matter.

(b) Upon display of the driver's license, the apprehending officer shall release the person so charged for his or her further appearance before the proper judicial officer as required by the summons. The court in which the charges are lodged shall immediately forward to the Department of Driver Services of this state the driver's license number if the person fails to appear and answer to the charge against him or her. The commissioner of driver services shall, upon receipt of a license number forwarded by the court, suspend the driver's license and driving privilege of the defaulting person until notified by the court that the charge against the person has been finally adjudicated. Such person's license shall be reinstated if the person submits proof of payment of the fine from the court of jurisdiction and pays to the Department of Driver Services a restoration fee of \$50.00 or \$25.00 when such reinstatement is processed by mail.

(b.1) It shall be the duty of a law enforcement officer or emergency medical technician responding to the scene of any motor vehicle accident or other accident involving a fatal injury to examine immediately the driver's license of the victim to determine the victim's wishes concerning organ donation. If the victim has indicated that he or she wishes to be an organ donor, it shall be the duty of such law enforcement officer or emergency medical technician to take appropriate action to ensure, if possible, that the victim's organs shall not be imperiled by delay in verification by the donor's next of kin.

(c) Nothing in this Code section bars any law enforcement officer from arresting or from seizing the driver's license of any individual possessing a fraudulent license or a suspended license or operating a motor vehicle while his or her license is suspended, outside the scope of a driving permit, or without a license.

(d) The commissioner of driver services shall be authorized to promulgate reasonable rules and regulations to carry out the purposes of this Code section and to establish agreements with other states whereby a valid license from that state may be accepted for purposes of this Code section. (Ga. L. 1973, p. 435, §§ 1, 2; Ga. L. 1976, p. 213, § 1; Ga. L. 1979, p. 759, § 1; Ga. L. 1982, p. 1136, §§ 3, 6; Ga. L. 1986, p. 1607, § 1; Ga. L. 1987, p. 542, § 3; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 94, § 17; Ga. L. 1991, p. 1776, § 1; Ga. L. 1996, p. 1624, §§ 2, 3; Ga. L. 2000, p. 951, § 12-1; Ga. L. 2005, p. 334, § 7-3/HB 501; Ga. L. 2011, p. 479, § 4/HB 112.)

The 2011 amendment, effective July 1, 2011, in subsection (a), redesignated the existing language as individual paragraphs and made related capitalization changes; deleted “or” at the end of para-

graph (a)(4); added paragraphs (a)(5) through (a)(7); and redesignated former paragraph (a)(5) as paragraph (a)(8).
Cross references. — Transportation of hazardous materials, § 40-1-20.

17-6-12. Discretion of court to release person charged with crime on person’s own recognizance only; effect of failure of person charged to appear for trial.

(a) As used in this Code section, the term “bail restricted offense” means the person is charged with:

- (1) A serious violent felony as such term is defined in Code Section 17-10-6.1; or
- (2) A felony offense of:
 - (A) Aggravated assault;
 - (B) Aggravated battery;
 - (C) Hijacking a motor vehicle;
 - (D) Aggravated stalking;
 - (E) Child molestation;
 - (F) Enticing a child for indecent purposes;
 - (G) Pimping;
 - (H) Robbery;
 - (I) Bail jumping;
 - (J) Escape;
 - (K) Possession of a firearm or knife during the commission of or attempt to commit certain crimes;
 - (L) Possession of firearms by convicted felons and first offender probationers;

(M) Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine;

(N) Participating in criminal street gang activity;

(O) Habitual violator; or

(P) Driving under the influence of alcohol, drugs, or other intoxicating substances.

(b) A person charged with a bail restricted offense shall not be released on bail on his or her own recognizance for the purpose of entering a pretrial release program, a pretrial release and diversion program, or a pretrial intervention and diversion program as provided for in Article 4 of Chapter 18 of Title 15, or Article 5 of Chapter 8 of Title 42, or pursuant to Uniform Superior Court Rule 27, unless an elected magistrate, elected state or superior court judge enters a written order to the contrary specifying the reasons why such person should be released upon his or her own recognizance.

(c) Except as provided in subsection (b) of this Code section and in addition to other laws regarding the release of an accused person, the judge of any court having jurisdiction over a person charged with committing an offense against the criminal laws of this state shall have authority, in his or her sound discretion and in appropriate cases, to authorize the release of the person upon his or her own recognizance only.

(d) Upon the failure of a person released on his or her own recognizance only to appear for trial, if the release is not otherwise conditioned by the court, the court may summarily issue an order for his or her arrest which shall be enforced as in cases of forfeited bonds. (Ga. L. 1969, p. 72, §§ 1, 2; Ga. L. 2010, p. 226, § 2/HB 889; Ga. L. 2011, p. 752, § 17/HB 142.)

The 2010 amendment, effective July 1, 2010, added subsections (a) and (b); redesignated former subsections (a) and (b) as present subsections (c) and (d), respectively; inserted “or her” in two places in subsections (c) and (d); and substituted “Except as provided in subsection (b) of this Code section and in” for “In” at the beginning of subsection (c).

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, revised punctuation in subparagraph (a)(2)(C).

Editor’s notes. — Ga. L. 2011, p. 752, § 17(1), which amended this Code section, purported to amend subparagraph (a)(1)(C) but actually amended subparagraph (a)(2)(C).

ARTICLE 2

SURETIES

PART 1

GENERAL PROVISIONS

17-6-31. Surrender of principal by surety; forfeiture of bond; death of principal.

JUDICIAL DECISIONS

Surety acted with due diligence. —

Bond forfeiture was properly set aside under O.C.G.A. § 17-6-31(d)(2) because the surety acted with due diligence in investigating the principal's identity since it reasonably relied on the county jail to alert it as to aliases, it verified the bond application information, and it had no access to other databases regarding aliases. *State v. Anytime Bail Bonding, Inc.*, 301 Ga. App. 832, 690 S.E.2d 193 (2009).

Principal on active military duty.

As an alien who suffered a bond forfeiture for failing to appear at the alien's arraignment on child cruelty charges was not an individual on active military duty, the alien could not rely on the holding in *Raburn Bonding Co. v. State of Ga.*, 244 Ga. App. 386; 535 S.E.2d 763 (2000) as a basis for an argument that the forfeiture of the alien's bond should not have been allowed. *Gomez-Ramos v. State*, 297 Ga. App. 113, 676 S.E.2d 382 (2009).

PART 2

PROFESSIONAL BONDSMEN

17-6-50. Persons deemed professional bondsmen; criminal background investigation information to be provided to clerk of court.

(a) Bondsmen or persons who hold themselves out as signers or sureties of bonds for compensation are declared to be professional bondsmen.

(b) A professional bondsperson is one who holds himself or herself out as a signer or surety of bonds for compensation who must meet the following qualifications:

(1) Is 18 years of age or over;

(2) Is a resident of the State of Georgia for at least one year before making application to write bonds;

(3) Is a person of good moral character and has not been convicted of a felony or any crime involving moral turpitude; and

(4) Is approved by the sheriff and remains in good standing with respect to all applicable federal, state, and local laws and all rules

and regulations established by the sheriff in the county where the bonding business is conducted.

(c) The sheriff of the county in which the bonding business is conducting business or is seeking approval to conduct business shall initiate a criminal background investigation to ensure that a professional bondsman has not been convicted of a felony or a crime involving moral turpitude in this state or any other jurisdiction. The sheriff shall require the professional bondsman to furnish two full sets of fingerprints which the sheriff shall submit to the Georgia Crime Information Center. The center shall submit a full set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check.

(d) It shall be the duty of each professional bondsman approved by the sheriff in accordance with this part to provide the clerk of each court before which one or more of such professional bondsman's principals are required to appear with the business name, complete address, telephone number, and e-mail address of the chief operating officer or his or her designee of such professional bondsman for the purpose of receiving any notices that may be sent pursuant to Code Section 17-6-71. Each professional bondsman shall have the duty to keep such information current and accurate. It shall be the duty of each clerk of court to keep, maintain, and update such information as provided by a professional bondsman. (Ga. L. 1921, p. 243, § 5; Code 1933, § 27-502; Ga. L. 1994, p. 532, § 3; Ga. L. 2002, p. 942, § A; Ga. L. 2009, p. 688, § 1/HB 147.)

The 2009 amendment, effective May 5, 2009, added subsection (d).

ARTICLE 3

PROCEEDINGS FOR FORFEITURE OF BONDS OR RECOGNIZANCES

17-6-70. When forfeiture occurs.

JUDICIAL DECISIONS

Continuance did not render original notice invalid. — Final judgment of forfeiture on a criminal appearance bond posted by the surety was proper under O.C.G.A. § 17-6-70(a) because the surety received notice of the execution hearing within the statutory time period under O.C.G.A. § 17-6-71(a) and the execution hearing took place within the required window. That the state sought and obtained a continuance from the

originally-scheduled date for the execution hearing did not magically render the original notice invalid; because the original notice was valid, that notice was also not later invalidated by a subsequent notice of a new hearing date. *Powell v. State*, 313 Ga. App. 535, 722 S.E.2d 158 (2012).

Cited in *Northeast Atlanta Bonding Co. v. State*, 308 Ga. App. 573, 707 S.E.2d 921 (2011).

17-6-71. Execution hearing on failure of principal to appear.

(a) The judge shall, at the end of the court day, upon the failure of the principal to appear, forfeit the bond and order an execution hearing not sooner than 120 days but not later than 150 days after such failure to appear. Notice of the execution hearing shall be served by the clerk of the court in which the bond forfeiture occurred within ten days of such failure to appear by certified mail or by electronic means as provided in Code Section 17-6-50 to the surety at the address listed on the bond or by personal service to the surety within ten days of such failure to appear at its home office or to its designated registered agent. Service shall be considered complete upon the mailing of such certified notice. Such ten-day notice shall be adhered to strictly. If notice of the execution hearing is not served as specified in this subsection, the surety shall be relieved of liability on the appearance bond.

(b) If at the execution hearing it is determined that judgment should be entered, the judge shall so order and a writ of fieri facias shall be filed in the office of the clerk of the court where such judgment is entered. The provisions of this subsection shall apply to all bail bonds, whether returnable to superior court, state court, probate court, magistrate court, or municipal court. (Laws 1831, Cobb's 1851 Digest, p. 862; Code 1863, § 4585; Code 1868, § 4606; Code 1873, § 4703; Code 1882, § 4703; Penal Code 1895, § 937; Penal Code 1910, § 962; Code 1933, § 27-906; Ga. L. 1943, p. 282, § 2; Ga. L. 1953, Jan.-Feb. Sess., p. 452, § 1; Code 1981, § 17-6-71; Ga. L. 1982, p. 1224, § 2; Ga. L. 1983, p. 1203, § 2; Ga. L. 1986, p. 1588, § 3; Ga. L. 1987, p. 1342, § 3; Ga. L. 1989, p. 556, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1990, p. 2336, § 1; Ga. L. 1992, p. 2933, § 3; Ga. L. 2000, p. 1589, § 3; Ga. L. 2009, p. 688, § 2/HB 147.)

The 2009 amendment, effective May 5, 2009, in subsection (a), in the second sentence, inserted "by the clerk of the court in which the bond forfeiture oc-

curred" and substituted "by electronic means as provided in Code Section 17-6-50" for "statutory overnight delivery" and added the last two sentences.

JUDICIAL DECISIONS

Notice sufficient for final judgment of forfeiture. — Trial court did not err when the court entered a final judgment of forfeiture because the first occasion for the satisfaction of the notice requirement arose when the defendant failed for a second time to appear at a pretrial hearing after the hearing was rescheduled due to the fact that notice was not given to the surety. Furthermore, because notice was given to the surety within ten days of the second hearing, there was strict compli-

ance with the statutory notice requirement under O.C.G.A. § 17-6-71(a). *North-east Atlanta Bonding Co. v. State*, 308 Ga. App. 573, 707 S.E.2d 921 (2011).

Substantial compliance with notice requirement. — Trial court properly denied a surety's motion to dismiss the state's motion for bond forfeiture regarding a principal who failed to appear as the state substantially complied with the notice requirements of O.C.G.A. § 17-6-71(a) even though the surety did

not submit the surety's motion until 15 days after the failure to appear and did not serve the surety with notice of the motion until 22 days from the date of the principal's failure to appear. Further, the surety failed to show any harm from the alleged notice violation. *Northeast Atlanta Sur. Co. v. Perdue*, 294 Ga. App. 32, 668 S.E.2d 508 (2008).

Delay in execution hearings.

A surety showed no harm when instead of setting a hearing after the principal failed to appear for trial, the trial court placed the case on a bench warrant calendar, then scheduled a hearing and gave the surety notice of the hearing after the principal failed to appear at the calendar call. Accordingly, it was proper to order forfeiture of the bond. *Troup Bonding Co. v. State of Ga.*, 292 Ga. App. 5, 663 S.E.2d 734 (2008).

Continuance did not render original notice invalid. — Final judgment of forfeiture on a criminal appearance bond posted by the surety was proper because the surety received notice of the execution

hearing within the statutory time period under O.C.G.A. § 17-6-71(a) and the execution hearing took place within the required window. That the state sought and obtained a continuance from the originally scheduled date for the execution hearing did not magically render the original notice invalid; because the original notice was valid, it was also not later invalidated by a subsequent notice of a new hearing date. *Powell v. State*, 313 Ga. App. 535, 722 S.E.2d 158 (2012).

Appellate jurisdiction from forfeiture order was proper. — Contrary to the state's contention, a direct appeal was authorized from an order forfeiting a surety's criminal appearance bond because the trial court entered a final judgment of forfeiture pursuant to O.C.G.A. § 17-6-71(b) after conducting an execution hearing; thus, appellate jurisdiction was proper. *Anytime Bail Bonding, Inc. v. State*, 299 Ga. App. 695, 683 S.E.2d 358 (2009), cert. denied, No. S10C0045, 2010 Ga. LEXIS 154 (Ga. 2010).

17-6-72. Conditions not warranting forfeiture of bond for failure to appear; remission of forfeiture.

(a) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court by the written statement of a licensed physician that the principal on the bond was prevented from attending by some mental or physical disability.

(b) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court that the principal on the bond was prevented from attending because he or she was detained by reason of arrest, sentence, or confinement in a penal institution or jail in the State of Georgia, or so detained in another jurisdiction, or because he or she was involuntarily confined or detained pursuant to court order in a mental institution in the State of Georgia or in another jurisdiction. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement and such notice may be sent from the holding institution by mail or delivered by hand or by facsimile machine. Upon the presentation of such written notice to the clerk of the proper court, the prosecuting attorney, and the sheriff or other law enforcement officer having jurisdiction over the case, along with a letter of intent to pay all costs of returning the principal to the jurisdiction of the court, such notice and letter shall serve as the surety's request for

a detainer or hold to be placed on the principal. Should there be a failure to place a detainer or hold within 15 days, excluding Saturdays, Sundays, and legal holidays, and after such presentation of such notice and letter of intent to pay costs, the surety shall then be relieved of the liability for the appearance bond without further order of the court.

(c) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court that prior to the entry of the judgment on the forfeiture the principal on the bond is in the custody of the sheriff or other responsible law enforcement agency. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement and such notice may be sent from the holding institution by mail or delivered by hand or by facsimile machine. Upon presentation of such written notice to the clerk of the proper court, the prosecuting attorney, and the sheriff or other law enforcement officer having jurisdiction over the case along with a letter of intent to pay all costs of returning the principal to the jurisdiction of the court, such notice and letter shall serve as the surety's request for a detainer or hold to be placed against the principal. Should there be a failure to place a detainer or hold within 15 days, excluding Saturdays, Sundays, and legal holidays, and after presentation of such notice and letter of intent to pay costs, the surety shall then be relieved of the liability for the appearance bond without further order of the court.

(c.1) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court that the principal on the bond was prevented from attending because he or she was deported by federal authorities. An official written notice of such deportation from a federal official shall be considered proof of the principal's deportation.

(d) In cases in which paragraph (3) of this subsection is not applicable, on application filed within 120 days from the payment of judgment, the court shall order remission under the following conditions:

(1) Provided the bond amount has been paid within 120 days after judgment and the delay has not prevented prosecution of the principal and upon application to the court with prior notice to the prosecuting attorney of such application, said court shall direct remission of 95 percent of the bond amount remitted to the surety if the surety locates the principal in the custody of the sheriff in the jurisdiction where the bond was made or in another jurisdiction causing the return of the principal to the jurisdiction where the bond was made, apprehends, surrenders, or produces the principal, if the apprehension or surrender of the principal was substantially procured or caused by the surety, or if the location of the principal by the surety caused the adjudication of the principal in the jurisdiction in

which the bond was made. Should the surety, within two years of the principal's failure to appear, locate the principal in the custody of the sheriff in the jurisdiction where the bond was made or in another jurisdiction causing the return of the principal to the jurisdiction where the bond was made, apprehend, surrender, or produce the principal, if the apprehension or surrender of the principal is substantially procured or caused by the surety, or if the location of the principal by the surety causes the adjudication of the principal in the jurisdiction in which the bond was made, the surety shall be entitled to a refund of 50 percent of the bond amount. The application for 50 percent remission shall be filed no later than 30 days following the expiration of the two-year period following the date of judgment;

(2) Remission shall be granted upon condition of the payment of court costs and of the expenses of returning the principal to the jurisdiction by the surety; or

(3) If, within 120 days after judgment, the surety surrenders the principal to the sheriff or responsible law enforcement officer, or said surrender has been denied by the sheriff or responsible law enforcement officer, or surety locates the principal in custody in another jurisdiction, the surety shall only be required to pay costs and 5 percent of the face amount of the bond, which amount includes all surcharges. If it is shown to the satisfaction of the court, by the presentation of competent evidence from the sheriff or the holding institution, that said surrender has been made or denied or that the principal is in custody in another jurisdiction or that said surrender has been made and that 5 percent of the face amount of the bond and all costs have been tendered to the sheriff, the court shall direct that the judgment be marked satisfied and that the writ of execution, *fi. fa.*, be canceled. (Ga. L. 1965, p. 266, §§ 1-3; Code 1981, § 17-6-72; Ga. L. 1982, p. 1224, § 2; Ga. L. 1982, p. 1658, § 2; Ga. L. 1983, p. 3, § 14; Ga. L. 1983, p. 1203, § 3; Ga. L. 1985, p. 982, § 1; Ga. L. 1986, p. 1588, § 4; Ga. L. 1987, p. 1342, § 4; Ga. L. 1989, p. 556, § 2; Ga. L. 1990, p. 2336, § 2; Ga. L. 1992, p. 2933, § 4; Ga. L. 1996, p. 1233, § 3; Ga. L. 2009, p. 688, § 2A/HB 147.)

The 2009 amendment, effective May 5, 2009, added subsection (c.1).

JUDICIAL DECISIONS

Forfeiture exceptions did not apply. — The bond forfeiture exceptions found in O.C.G.A. § 17-6-72(b), (c) did not apply to an alien's bond forfeiture because the alien's failure to appear at an arraignment was because the alien had been deported, not because the alien was in a

penal institution or jail because of an arrest or sentence, was confined to a mental institution because of a court order, or was in the custody of a sheriff or other responsible law enforcement agency. *Gomez-Ramos v. State*, 297 Ga. App. 113, 676 S.E.2d 382 (2009).

Criminal history calculation. — Sentence imposed for defendant's 2008 bank robbery was vacated and the case was remanded for resentencing because defendant's bond forfeiture should not factor into the calculation of defendant's criminal history under U.S. Sentencing Guidelines Manual § 4A1.2(a) (2008) if defendant's failure to attend the February 2008 arraignment was involuntary under O.C.G.A. § 17-6-72(b), and the district court, assuming that all Georgia bond

forfeitures should be considered convictions for purposes of calculating criminal history under the sentencing guidelines pursuant to O.C.G.A. § 40-13-58, did not determine whether defendant's failure to attend the arraignment was willful or involuntary. *United States v. Daniel*, 358 Fed. Appx. 79 (11th Cir. 2009).

Cited in *Northeast Atlanta Bonding Co. v. State*, 308 Ga. App. 573, 707 S.E.2d 921 (2011).

CHAPTER 7

PRETRIAL PROCEEDINGS

Article 2

Commitment Hearings

- Sec.
- 17-7-23. Duties of court of inquiry; preclusion of certain courts from trying charges involving Code Section 16-11-126.
- 17-7-25. (Effective January 1, 2013. See note.) Power of court to compel attendance of witnesses.
- 17-7-28. (Effective January 1, 2013. See note.) Hearing of evidence by court of inquiry; right of accused to testify; application of rules of evidence; effect of failure of accused to testify.

Article 4

Accusations

- 17-7-70.1. Trial upon accusations in certain felony and misdemeanor cases; trial upon plea of guilty or nolo contendere.

Article 5

Arraignment and Pleas Generally

- 17-7-93. (Effective January 1, 2013. See note.) Reading of indictment or accusation; answer of accused to charge; recordation of "guilty" plea and pronouncement of judgment; withdrawn

Sec.

guilty pleas; pleas by immigrants.

Article 6

Demurrers, Motions, and Special Pleas and Exceptions

PART 2

INSANITY AND MENTAL INCOMPETENCY

- 17-7-129. Mental capacity to stand trial; release of competency evaluation to prosecuting attorney.
- 17-7-130. Proceedings upon plea of mental incompetency to stand trial.
- 17-7-131. Proceedings upon plea of insanity or mental incompetency at time of crime.

Article 7

Demand for Trial; Announcement of Readiness for Trial

- 17-7-170. Demand for speedy trial; service; discharge and acquittal for lack of prosecution; expiration; reversal on direct appeal; mistrial and retrial; special pleas of incompetency.
- 17-7-171. Time for demand for speedy trial in capital cases; discharge and acquittal where no trial held before end of two court terms of demand; counting of

terms in cases in which death
penalty is sought; special pleas
of incompetency.

ARTICLE 2

COMMITMENT HEARINGS

17-7-23. Duties of court of inquiry; preclusion of certain courts from trying charges involving Code Section 16-11-126.

(a) The duty of a court of inquiry is simply to determine whether there is sufficient reason to suspect the guilt of the accused and to require him to appear and answer before the court competent to try him. Whenever such probable cause exists, it is the duty of the court to commit.

(b) Any court, other than a superior court or a state court, to which any charge of a violation of Code Section 16-11-126 is referred for the determination required by this Code section shall thereafter have and exercise only the jurisdiction of a court of inquiry with respect to the charge and with respect to any other criminal violation arising from the transaction on which the charge was based and shall not thereafter be competent to try the accused for the charge or for any other criminal violation arising from the transaction on which the charge was based, irrespective of the jurisdiction that the court otherwise would have under any other law. (Orig. Code 1863, § 4618; Code 1868, § 4640; Code 1873, § 4738; Code 1882, § 4738; Penal Code 1895, § 912; Penal Code 1910, § 937; Code 1933, § 27-407; Ga. L. 1980, p. 415, § 1; Ga. L. 2010, p. 963, § 2-11/SB 308.)

The 2010 amendment, effective June 4, 2010, deleted “or Code Section 16-11-128” following “16-11-126” near the beginning of subsection (b). See the editor’s note for applicability.

Editor’s notes. — Ga. L. 2010, p. 963, § 3-1, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all

offenses committed on and after June 4, 2010 and shall not affect any prosecutions for acts occurring before June 4, 2010 and shall not act as an abatement of any such prosecution.

Law reviews. — For article, “Crimes and Offenses,” see 27 Ga. St. U. L. Rev. 131 (2011).

JUDICIAL DECISIONS

Admission of hearsay evidence in preliminary hearings. — Trial court did not err in ruling that hearsay evidence had to be admitted as legal evidence at preliminary hearings because magistrate judges were required to admit and weigh hearsay evidence in preliminary hearings;

the public’s interest in justice and safety is implicated when criminal charges are preliminarily dismissed against persons who were arrested pursuant to a showing of probable cause sufficient to obtain an arrest warrant. *Bethel v. Fleming*, 310 Ga. App. 717, 713 S.E.2d 900 (2011).

Hearsay evidence. — District attorney's declaratory judgment claim, which sought an order requiring magistrate judges to admit and consider hearsay evidence at preliminary hearings to determine whether to bind over a defendant for grand jury indictment, was proper as involving a justiciable controversy under O.C.G.A. § 9-4-2 because the magistrate court established a standard practice re-

quiring the production of direct evidence in addition to hearsay evidence to support a bindover determination at a preliminary hearing; the result was uncertainty and insecurity in the district attorney as to the district attorney's office's burden of proof and production at future preliminary hearings. *Bethel v. Fleming*, 310 Ga. App. 717, 713 S.E.2d 900 (2011).

17-7-25. (Effective January 1, 2013. See note.) Power of court to compel attendance of witnesses.

A court of inquiry shall have the same power to compel the attendance of witnesses as in other criminal cases, as set forth in and subject to all of the provisions of Chapter 13 of Title 24, at any location where the court shall conduct a hearing, provided that notice is given at least 24 hours prior to the hearing. A court of inquiry may order the arrest of witnesses if required to compel their attendance. (Orig. Code 1863, § 4617; Code 1868, § 4639; Code 1873, § 4736; Code 1882, § 4736; Penal Code 1895, § 909; Penal Code 1910, § 934; Code 1933, § 27-404; Ga. L. 1996, p. 742, § 3; Ga. L. 2011, p. 99, § 29/HB 24.)

The 2011 amendment, effective January 1, 2013, substituted "Chapter 13" for "Chapter 10" in the middle of the first sentence. See editor's note for applicability.

Editor's notes. — This Code section, as set forth above, is effective on January 1, 2013. For the version of this Code section effective until that date, see the bound volume.

Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

17-7-28. (Effective until January 1, 2013. See note.) Hearing of evidence by court of inquiry; right of defendant to testify; effect of failure of defendant to testify.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Hearsay evidence admissible in preliminary hearings. — Trial court did not err in ruling that hearsay evidence had to be admitted as legal evidence at

preliminary hearings because magistrate judges were required to admit and weigh hearsay evidence in preliminary hearings; the public's interest in justice and safety is implicated when criminal charges are preliminarily dismissed against persons who

were arrested pursuant to a showing of probable cause sufficient to obtain an arrest warrant. *Bethel v. Fleming*, 310 Ga. App. 717, 713 S.E.2d 900 (2011).

17-7-28. (Effective January 1, 2013. See note.) Hearing of evidence by court of inquiry; right of accused to testify; application of rules of evidence; effect of failure of accused to testify.

The court of inquiry shall hear all legal evidence submitted by either party. If the accused wishes to testify and announces in open court before the court of inquiry his or her intention to do so, the accused may testify in his or her own behalf. If the accused elects to testify, he or she shall be sworn as any other witness and may be examined and cross-examined as any other witness. The rules of evidence shall apply except that hearsay shall be admissible. The failure of an accused to testify shall create no presumption against the accused, and no comment may be made because of such failure. (Orig. Code 1863, § 4614; Code 1868, § 4636; Code 1873, § 4733; Code 1882, § 4733; Penal Code 1895, § 910; Penal Code 1910, § 935; Code 1933, § 27-405; Ga. L. 1962, p. 453, § 1; Ga. L. 1973, p. 292, § 1; Ga. L. 2011, p. 99, § 30/HB 24.)

The 2011 amendment, effective January 1, 2013, in the second sentence, substituted “accused” for “defendant”, inserted “or her” twice and substituted “the accused” for “he” in the middle; in the third sentence, substituted “the accused elects to testify, he or she” for “he so elects, he” at the beginning and deleted “, except that no evidence of general bad character or prior convictions shall be admissible unless and until the defendant first puts his character into issue” following “witness” at the end; added the fourth sentence; and, in the last sentence, substituted “an accused” for “a defendant” near the beginning and substituted “the accused” for “him” near the middle. See editor’s note for applicability.

Editor’s notes. — This Code section, as set forth above, is effective on January 1, 2013. For the version of this Code section effective until that date, see the bound volume.

Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, “Evidence,” see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 3

INDICTMENTS

17-7-50. Right to grand jury hearing within 90 days where bail refused; right to have bail set absent hearing within 90 day period.

JUDICIAL DECISIONS

Failure to set bail after 90 days, etc.

Because the defendant was under arrest, physically restrained, and under guard while in a hospital, the defendant was in “confinement,” as the term was used in O.C.G.A. § 17-7-50; therefore, be-

cause the defendant was held for 90 days without grand jury action, the trial court erred in denying the defendant’s motion for bail on the charges for which the defendant was arrested. *Tatis v. State*, 289 Ga. 811, 716 S.E.2d 203 (2011).

17-7-50.1. Time for presentment of child’s case to a grand jury; exception.

JUDICIAL DECISIONS

State failed to meet time limit for presenting case. — Superior court erred in denying the defendant juvenile’s motion to transfer the case to the juvenile court because the state failed to meet the time limit for presenting the case to the grand jury, and under the plain language of O.C.G.A. § 17-7-50.1(b), it was mandatory that the case be transferred back to the juvenile court; because the case should have been transferred, the superior court lacked jurisdiction to accept the defendant’s guilty plea to aggravated assault, which was made only after the defendant’s request for a certificate of immediate review was denied. *Hill v. State*, 309 Ga. App. 531, 710 S.E.2d 667 (2011).

O.C.G.A. § 17-7-50.1 plainly adopts the date of detention, not the date of transfer, as the point from which the time is calculated, and the statute explicitly applies whether the child is initially subject to the jurisdiction of the superior court through committing an enumerated offense, O.C.G.A. § 15-11-28, or via a transfer to superior court after a petition and hearing. *Hill v. State*, 309 Ga. App. 531, 710 S.E.2d 667 (2011).

Superior court loss of jurisdiction after 180 days. — Because a grand jury did not indict a juvenile within 180 days

after the juvenile’s detention as required by O.C.G.A. § 15-11-28(b)(2)(A)(vii) and no extension of time had been granted as of that date, the grand jury lost authority over the case by operation of law. The trial court’s order granting the state’s request for an out-of-time extension was void. *Nunnally v. State*, 311 Ga. App. 558, 716 S.E.2d 608 (2011).

Juvenile court erred in granting the state’s motion to transfer the defendant juvenile’s case back to the superior court pursuant to O.C.G.A. § 15-11-30.2 because the superior court had properly transferred the case to the juvenile court since the defendant was not indicted within 180 days of detention as required by O.C.G.A. § 17-7-50.1; the time limits set forth in O.C.G.A. § 17-7-50.1 are plainly stated and mandatory and clearly express the legislative intent that when a juvenile is detained and the superior court is exercising jurisdiction under either O.C.G.A. § 15-11-28(b) or O.C.G.A. § 15-11-30.2, the state must obtain an indictment within the specified time or the superior court loses the jurisdiction conferred by those provisions. In the *Interest of C.B.*, 313 Ga. App. 778, 723 S.E.2d 21 (2012).

Same 180-day time limitation applies to

both O.C.G.A. §§ 15-11-28(b) and 15-11-30.2, and that 180 days begins to run on the day the juvenile is detained whenever the superior court is exercising jurisdiction under either section; it necessarily follows that anytime the superior court loses jurisdiction which was conferred by O.C.G.A. § 15-11-28(b) because the state failed to obtain an indictment within 180 days of the date the juvenile was detained, the time will also have expired within which the state could procure an indictment if the superior court were proceeding under O.C.G.A. § 15-11-30.2 and, thus, a transfer back to the superior court under those circum-

stances is pointless since an indictment returned by the grand jury would be void. In the Interest of C.B., 313 Ga. App. 778, 723 S.E.2d 21 (2012).

Although O.C.G.A. § 17-7-50.1 allows the state to request one automatic 90-day extension, this extension cannot be granted after the expiration of the 180 days; the legislature intended to set time limitations for the state to act in those situations in which the juvenile is detained and the superior court is exercising jurisdiction over the matter pursuant to either O.C.G.A. § 15-11-28(b) or O.C.G.A. § 15-11-30.2. In the Interest of C.B., 313 Ga. App. 778, 723 S.E.2d 21 (2012).

17-7-52. Procedure for indictment of peace officer for crime in performance of duties; notification; rights of officer.

JUDICIAL DECISIONS

Purpose — O.C.G.A. § 45-11-4 furthers the legitimate state interest of protecting certain government officials, vested with the authority to exercise discretion, against possible frivolous indictments pursued by persons aggrieved by the exercise of that discretion because the legislative rationale is that if these officials do not have such protection, their reputation and performance of their duties could be compromised while they are defending baseless charges; by enacting O.C.G.A. § 17-7-52, the General Assembly intended to afford peace officers the enhanced protections given to other public officials regarding accusations arising from the performance or nonperformance of their official duties, and thus, the legitimate purpose of O.C.G.A. § 17-7-52, in conjunction with § 45-11-4, is to protect peace officers from harassing or frivolous charges before the grand jury. *State v. Smith*, 286 Ga. 409, 688 S.E.2d 348 (2010).

Presence before grand jury.

Trial court did not err in finding that the defendant, who was an officer with a college police department, was not entitled to be present and make a statement pursuant to O.C.G.A. §§ 17-7-52(a) and 45-11-4 when the defendant's case was presented to the grand jury because the

indictment did not allege that the crimes occurred while the defendant was performing the defendant's duties; the defendant was not on campus as defined by O.C.G.A. § 20-8-1(1), and the record did not show that the defendant's official duties as a campus police officer included the commission of the acts at issue, while the defendant was off duty and engaged in leisure activities outside of the defendant's jurisdiction. *Worthy v. State*, 307 Ga. App. 297, 704 S.E.2d 808 (2010).

Police officer failed to show any violation of statutory rights. — Trial court properly denied defendant's demurrer and motion to quash based upon the state's alleged violation of defendant's rights under O.C.G.A. § 45-11-4(g) and (h), with regard to the procedure to be followed when charging a public officer with a crime, as defendant failed to show that the state violated any of defendant's rights under the statute. *Brandenburg v. State*, 292 Ga. App. 191, 663 S.E.2d 844 (2008), cert. denied, 2008 Ga. LEXIS 921 (Ga. 2008).

Lack of proper notice to police officer. — With regard to a defendant's conviction on three counts of false statements and writings, the trial court erred by denying the defendant's motion for a new trial as a result of erring by denying the

defendant's plea in abatement and motion to dismiss the indictment as the state violated the notice provisions under O.C.G.A. §§ 17-7-52 and 45-11-4, with respect to peace officers and public officials, by failing to notify the defendant when the proposed indictment would be presented to the grand jury. The defendant, a police officer and police chief of two municipalities, was accused of falsifying time records and, as a police officer, was entitled to the notice set forth under the statutes. *Smith v. State*, 297 Ga. App. 300, 676 S.E.2d 750 (2009), *aff'd*, 286 Ga. 409, 688 S.E.2d 348 (2010).

Court of appeals did not err in finding that the state failed to notify the defendant when the proposed indictment would be presented and in directing that the

defendant's convictions be set aside because notice of the specific time and place of the grand jury presentment was required to be provided to the defendant by the state; timely serving the accused with a copy of the proposed bill of indictment but failing to timely inform the accused of when and where the reckoning with the grand jury will occur is not substantial compliance with the requirements of O.C.G.A. §§ 17-7-52 and 45-11-4 in regard to notification to the accused, and the task of providing the notice to the accused of the date, time, and place of the state's evidentiary showing logically and pragmatically must lie with the state. *State v. Smith*, 286 Ga. 409, 688 S.E.2d 348 (2010).

17-7-53.1. Quashing of second grand jury indictment or presentment bars further prosecution.

JUDICIAL DECISIONS

Cited in *Smith v. State*, 297 Ga. App. 300, 676 S.E.2d 750 (2009); *Metts v. State*, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

17-7-54. Form of indictment by grand jury.

Law reviews. — For survey article on death penalty law, see 59 *Mercer L. Rev.* 123 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

MULTIPLE COUNTS

PARTICULAR OFFENSES

General Consideration

Indictment for street gang activity. — Indictment for criminal street gang activity under O.C.G.A. § 16-15-4(a) was sufficient to withstand 12 defendants' general and special demurrers. Although the indictment did not allege a date that the gang came into existence, the indictment sufficiently alleged that the gang existed at the time of each of the enumerated predicate offenses. *State v. Hood*, 307 Ga. App. 439, 706 S.E.2d 566 (2010).

Indictment sufficient to withstand demurrer. — Trial court's decision overruling the defendant's special demurrer to an indictment charging the defendant with trafficking in methamphetamine and misdemeanor possession of marijuana in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-31(e) was authorized because the allegations of the indictment were sufficient to be easily understood by the jury, to allow the defendant to prepare the defendant's defense, and to protect the

defendant from double jeopardy; the indictment sufficiently set forth the date of the offenses and tracked the material language of the statutes proscribing the charged offenses, and the language set forth in the counts against the codefendants separately designated the drugs upon which those charges were based and made clear that the defendant's drug charges were not based upon the drugs allegedly possessed by those individual codefendants. *Fyfe v. State*, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

Failure to identify dates of offenses.

Accusation that alleged contributing to the delinquency of a minor and electronically furnishing obscene material to a minor within a two and a half month time frame was subject to a demurrer because the state gave no explanation as to why an investigating officer was unable to ascertain the dates of the offenses from the victim's computer. *State v. Meeks*, 309 Ga. App. 855, 711 S.E.2d 403 (2011).

Indictment sufficient. — Indictment charged the defendant with child molestation using the language found in the relevant statute and described the acts constituting the offense sufficiently to put the defendant on notice of the offense with which the defendant was charged; accordingly, the defendant's claim that the indictment was invalid was without merit. *Golden v. State*, 299 Ga. App. 407, 683 S.E.2d 618 (2009), cert. denied, No. S09C1904, 2010 Ga. LEXIS 56 (Ga.); cert. denied, U.S. , 130 S. Ct. 3358, 176 L. Ed. 2d 1250 (2010).

Trial counsel was not ineffective for failing to challenge the validity of an indictment because pursuant to O.C.G.A. § 17-7-54 the indictment showed that it was a "True Bill," was signed by the grand jury foreperson, and was filed with the clerk's office with the clerk of the court's name prior to the defendant's arraignment, where the defendant and counsel signed the indictment; there is no express requirement that the indictment contain a written statement that the indictment was received in "open court," or that the indictment be signed. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

How defects or irregularities to be complained of.

Defendant's motions for a new trial and in arrest of judgment challenging the wording of the indictment charging the defendant with aggravated assault, O.C.G.A. § 16-5-21(a)(2), (3), were properly denied because the defendant could not have admitted the allegations of the indictment without admitting that the defendant was guilty of a crime, and, under O.C.G.A. § 17-7-110, having failed to file a timely special demurrer, the defendant waived the right to a perfect indictment. *McDaniel v. State*, 298 Ga. App. 558, 680 S.E.2d 593 (2009).

Cited in *State v. Godfrey*, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Multiple Counts

Sufficiency of the indictment involving two property offenses. — Trial court erred in quashing an indictment for counts of residential mortgage fraud, in violation of O.C.G.A. § 16-8-102, and counts of felony theft by deception, in violation of O.C.G.A. § 16-8-3, because: (1) certain allegations between counts in the indictment were mere surplusage and did not invalidate the indictment; (2) the indictment was not duplicitous under O.C.G.A. § 16-1-7(a)(2); (3) the indictment was sufficient pursuant to the requirements of O.C.G.A. § 17-7-54(a) to withstand general and special demurrers as each count sufficiently stated the offense; and (4) each count was sufficient to charge each of the named defendants as either the actual perpetrator or as a party to the crime pursuant to O.C.G.A. §§ 16-2-20(a) and 16-2-21. *State v. Corhen*, 306 Ga. App. 495, 700 S.E.2d 912 (2010).

Particular Offenses

Sufficiency of indictment charging aggravated assault by dentist. — Count nine in an indictment charging a defendant, allegedly an oral surgeon, with aggravated assault under O.C.G.A. § 16-5-21(a)(2) was sufficient under O.C.G.A. § 17-7-54(a) because the general intent required under § 16-5-21(a)(2) did not need to be expressly alleged and the

use of the phrase “serious bodily harm” was substantially the same as the statutory language; additional pleading was not required simply because the case involved a doctor and a patient. *State v. Austin*, 297 Ga. App. 478, 677 S.E.2d 706 (2009).

Sufficiency of indictment alleging RICO violations. — An indictment, which described a scheme of fraudulent borrowing from the parishioners of one defendant, a pastor, to benefit the pastor and the other defendant, a banker, sufficiently described the RICO crimes and predicate acts under O.C.G.A. § 16-14-4(a) and (c) so as to inform the defendants of the charges against the defendants and protect the defendants against another prosecution for the same offense. *State v. Pittman*, 302 Ga. App. 531, 690 S.E.2d 661 (2010).

One count of indictment charging witness intimidation insufficient. — Trial court properly granted a defendant’s special demurrer as to one count of a two count indictment charging the defendant with influencing a witness as the use of the term “intimidation,” without specifying the way the defendant allegedly did so, was generic and did not adequately inform the defendant of the facts consti-

tuting the offense. *State v. Delaby*, 298 Ga. App. 723, 681 S.E.2d 645 (2009).

Indictment for theft by taking sufficient. — Trial court did not err in denying a defendant’s general and special demurrers to an indictment charging the defendant with theft by taking in violation of O.C.G.A. § 16-8-2 because the indictment tracked the language of theft by taking and sufficiently placed the defendant on notice of the charges against the defendant, and the indictment also provided some factual detail to support the crimes alleged; in each count of theft by taking, the indictment alleged that the defendant took U.S. currency in excess of \$500 from a grocery store owner with the intention of depriving the owner of those funds on a specific date, and if the defendant admitted the conduct alleged in the indictment, the defendant would not be innocent of the crime. *Falagian v. State*, 300 Ga. App. 187, 684 S.E.2d 340 (2009).

Accusation that alleged that the defendant took “drugs the property of Dr. Bob Lanier having a value of less than \$500 with the intention of depriving said owner of said property” was sufficient to allege theft by taking under O.C.G.A. § 16-8-2. *State v. Meeks*, 309 Ga. App. 855, 711 S.E.2d 403 (2011).

ARTICLE 4

ACCUSATIONS

17-7-70. Trial upon accusations in felony cases; trial upon accusations of felony and misdemeanor cases in which guilty plea entered and indictment waived.

JUDICIAL DECISIONS

Motion for acquittal properly denied.

Trial court properly denied a defendant’s motion for discharge and acquittal on statutory speedy trial grounds pursuant to O.C.G.A. § 17-7-170(a) because the defendant’s speedy trial demand was premature and a nullity since the “complaint”

was filed after the defendant’s arrest, was not an accusation pursuant to O.C.G.A. §§ 17-7-70 and 17-7-70.1, and the prosecution did not proceed on the “complaint.” *Campbell v. State*, 294 Ga. App. 166, 669 S.E.2d 190 (2008).

Cited in *Steillman v. State*, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

17-7-70.1. Trial upon accusations in certain felony and misdemeanor cases; trial upon plea of guilty or nolo contendere.

(a)(1) In felony cases involving violations of the following:

(A) Code Sections 16-8-2, 16-8-14, 16-8-18, 16-9-1, 16-9-20, 16-9-31, 16-9-33, 16-9-37, 16-10-52, and 40-5-58;

(B) Article 1 of Chapter 8 of Title 16, relating to theft;

(C) Chapter 9 of Title 16, relating to forgery and fraudulent practices;

(D) Article 3 of Chapter 10 of Title 16, relating to escape and other offenses related to confinement; or

(E) Code Section 16-11-131, relating to possession of a firearm by a convicted felon or first offender probationer,

in which defendants have either been bound over to the superior court based on a finding of probable cause pursuant to a commitment hearing under Article 2 of this chapter or have expressly or by operation of law waived a commitment hearing, the district attorney shall have authority to prefer accusations, and the defendants shall be tried on such accusations according to the same rules of substantive and procedural laws relating to defendants who have been indicted by a grand jury.

(2) All laws relating to rights and responsibilities attendant to indicted cases shall be applicable to cases brought by accusations signed by the district attorney.

(3) The accusation need not be supported by an affidavit except in those cases in which the defendant has not been previously arrested in conjunction with the transaction charged in the accusation.

(a.1) The provisions of subsection (a) of this Code section shall apply to violations of Code Section 16-13-30 whenever there has been a finding of probable cause pursuant to a commitment hearing under Article 2 of this chapter or the accused has waived either expressly or by operation of law the right to this hearing.

(b) Judges of the superior court may open their courts at any time without the presence of either a grand jury or a trial jury to receive and act upon pleas of guilty or nolo contendere in felony and misdemeanor cases. The judge of the superior court may try the issues in such cases without a jury upon an indictment or upon an accusation filed by the district attorney where the defendant has waived trial by jury.

(c) An accusation substantially complying with the form provided in subsections (d) and (e) of Code Section 17-7-71 shall in all cases be sufficient.

(d) The district attorney may not bring an accusation pursuant to this Code section in those cases where the grand jury has heard evidence or conducted an investigation or in which a no bill has been returned.

(e) Notwithstanding the above provisions, nothing in this Code section shall affect the rights of police officers and public officials to appear before a grand jury as provided in Code Sections 17-7-52, 45-11-4, and 45-15-11. (Code 1981, § 17-7-70.1, enacted by Ga. L. 1992, p. 1808, § 1; Ga. L. 1996, p. 678, § 1; Ga. L. 1998, p. 208, § 1; Ga. L. 2012, p. 899, § 8-9/HB 1176.)

The 2012 amendment, effective July 1, 2012, deleted “16-9-2,” following “16-9-1,” in subparagraph (a)(1)(A). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after

that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

JUDICIAL DECISIONS

No accusation found. — Trial court properly denied a defendant’s motion for discharge and acquittal on statutory speedy trial grounds pursuant to O.C.G.A. § 17-7-170(a) because the defendant’s speedy trial demand was premature and a nullity since the “complaint” was filed

after the defendant’s arrest, was not an accusation pursuant to O.C.G.A. §§ 17-7-70 and 17-7-70.1, and the prosecution did not proceed on the “complaint.” *Campbell v. State*, 294 Ga. App. 166, 669 S.E.2d 190 (2008).

17-7-71. Trials of misdemeanors; trial of misdemeanor motor vehicle violations; form and contents of accusations; amendment of accusation; service of amendment upon defendant; continuances.

JUDICIAL DECISIONS

Amendment of accusation.

When defendant was prosecuted for serving alcohol to a minor, under O.C.G.A. § 3-3-23(a)(1), defendant did not show the accusation was improperly amended in violation of O.C.G.A. § 17-7-71(f) because: (1) it was not shown that the accusation was amended after trial commenced; and (2) while it was unknown if the amended accusation was served on defendant, the amendment, deleting the name of an undercover officer to whom alcohol was allegedly served, did not sur-

prise defendant, given extensive testimony that had been given about the undercover operation resulting in the charge against defendant. *Butler v. State*, 298 Ga. App. 129, 679 S.E.2d 361 (2009).

State was not barred from filing a formal accusation charging new violations even though the defendant was issued Uniform Traffic Citations (UTCs) at a traffic stop following a collision because the differences between the charges made in the UTCs and the charges set forth in the accusation did not affect the accusation’s

validity. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012).

Uniform traffic citation.

Trial court did not err in denying a defendant's motion to dismiss because even though a uniform traffic citation (UTC) did not list the defendant's name in the correct order and did not contain a date for the defendant's initial court appearance, the defendant was not prejudiced; the defendant was aware of the charge against the defendant and appeared at all scheduled court dates. Regardless of whether O.C.G.A. § 17-7-71(b)(1) allowed amendment to portions of a UTC other than the allegation, the state's accusation was sufficient to allow prosecution of the defendant for violating O.C.G.A. § 40-6-98 because O.C.G.A. § 17-7-71(b)(1) allowed misdemeanor cases to proceed upon an accusation framed and signed by the prosecuting attorney. *Switlick v. State*, 295 Ga. App. 849, 673 S.E.2d 323 (2009).

Charging instrument defective. —

Trial court's denial of a defendant's general demurrer to a charge against the defendant of violation of a family violence order, in violation of O.C.G.A. § 16-5-95(a), was error, as the accusation failed to state any specific acts that vio-

lated any specific terms of a family violence order, such that it failed to set out the essential elements of the crime or to apprise the defendant properly of the charge pursuant to O.C.G.A. § 17-7-71(c). *Newsome v. State*, 296 Ga. App. 490, 675 S.E.2d 229 (2009).

Charging instrument not defective.

— An accusation was not fatally defective because the accusation informed the defendants of the charges against them and protected them against another prosecution for the same offense, and they could not admit that they passed in an area defined by markings as a no-passing zone without being guilty of the crime charged. Moreover, to the extent that the defendants' attack on the accusation could be read as a special demurrer, seeking greater specificity, it was waived by their failure to raise the issue within 10 days after they pled to the accusation. *Haynes-Turner v. State*, 289 Ga. App. 652, 658 S.E.2d 203 (2008).

Accusation charging a defendant with causing the unjustifiable physical pain or suffering of a dog by failing to provide adequate food or water or medical care was sufficient to charge the defendant with cruelty to animals pursuant to O.C.G.A. § 16-12-4. *Ford v. State*, 306 Ga. App. 606, 703 S.E.2d 71 (2010).

ARTICLE 5

ARRAIGNMENT AND PLEAS GENERALLY

17-7-91. Date of arraignment; notice; service of notice and fee therefor; notice to surety on bond; arraignment; receipt and entering of plea; establishment of time for trial; effect of appearance and plea on notice requirement.

JUDICIAL DECISIONS

Waiver of arraignment and plea generally.

Because the defendant voiced no objection at trial to the alleged lack of arraignment or notice, any error in the lack of arraignment was waived by the defendant's failure to raise the issue prior to

verdict; even if there had been no waiver, the defendant failed to show, or even assert harm. *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

17-7-93. (Effective until January 1, 2013) Reading of indictment or accusation; answer of accused to charge; recodation of “guilty” plea and pronouncement of judgment; withdrawn guilty pleas; pleas by immigrants.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on death penalty law, see 59 Mercer L. Rev. 123 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
GUILTY PLEAS
WITHDRAWAL OF PLEAS

General Consideration

Indictment did not need to be read into record. — A sufficient factual basis was established for a defendant’s guilty plea to armed robbery, kidnapping, and possession of a firearm during the commission of a crime when the prosecutor stated that the defendant and an accomplice entered the victims’ apartment, forced the victims into rooms at gunpoint, tied the victims up, and stole some items; the prosecutor also noted that much of the crime had been recorded by a 9-1-1 operator; defense counsel stated that counsel had discussed the facts with the defendant; and the defendant conceded guilt. Therefore, it was not necessary that the indictment be read into the record. *Leary v. State*, 291 Ga. App. 754, 662 S.E.2d 733 (2008).

Wavier of arraignment. — Because the defendant voiced no objection at trial to the alleged lack of arraignment or notice, any error in the lack of arraignment was waived by the defendant’s failure to raise the issue prior to verdict; even if there had been no waiver, the defendant failed to show, or even assert harm. *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Guilty Pleas

Failure to notify defendant of ineligibility for parole. — Although the trial court did not tell the defendant that the defendant would be ineligible for parole, this was not grounds for overturning the

defendant’s guilty plea, and the fact that the trial court allegedly misinformed the defendant about eligibility for sentence review did not change the result as such eligibility was also a collateral consequence of pleading guilty. Furthermore, because the defendant did not timely seek sentence review, the defendant could not show harm. *Leary v. State*, 291 Ga. App. 754, 662 S.E.2d 733 (2008).

Extrinsic evidence did not support finding right against self-incrimination was knowingly, intelligently, or voluntarily waived. — Mere speculation that an appellant inmate had been informed of all three of the *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969) rights the inmate would be waiving by entering a guilty plea was insufficient to support a finding that extrinsic evidence showed that the inmate knowingly, intelligently, and voluntarily waived the inmate’s right to self-incrimination, particularly in light of the fact that defense counsel testified during a hearing on the inmate’s habeas petition that counsel did not recall what rights counsel might have discussed with the inmate but that it was not counsel’s practice to get into the specifics of any particular right being waived. *Denson v. Frazier*, 284 Ga. 858, 672 S.E.2d 625 (2009).

Withdrawal of Pleas

Purpose of the withdrawal provision, etc.

District court did not err in dismissing as time-barred an inmate’s 28 U.S.C.

§ 2254 petition because the inmate's untimely motion to withdraw the inmate's plea of guilty under O.C.G.A. § 17-7-93(b) was not a "properly filed" application for state postconviction relief for purposes of 28 U.S.C. § 2244(d)(2)'s tolling provisions of the Antiterrorism and Effective Death Penalty Act of 1996's one-year time period for filing 28 U.S.C. § 2254 petition. *Colbert v. Head*, 2005 U.S. App. LEXIS 17563 (11th Cir. Aug. 16, 2005) (Unpublished).

Withdrawal after term of court when sentence pronounced.

Trial court properly denied the defendant's motion to withdraw the defendant's guilty pleas because the defendant did not move to withdraw the defendant's guilty pleas until the term of court following the term in which the defendant was sentenced; therefore, the defendant's only available means to withdraw the defendant's guilty pleas was through habeas corpus proceedings, and even if the defendant's motion had been timely, the defendant voluntarily and intelligently entered the defendant's guilty pleas. *Loyd v. State*, 288 Ga. 481, 705 S.E.2d 616 (2011), cert. dismissed, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea to possession of a controlled substance as defendant entered the guilty plea seven years before the defendant filed a motion to withdraw; therefore, the trial court lacked jurisdiction to allow withdrawal of the plea under the general rule providing that a trial court lacked jurisdiction to allow the withdrawal of a guilty plea when the term of court had expired in which the defendant was sentenced. In light of those time limitations, it was too late for the defendant to withdraw the defendant's guilty plea seven years later, and nothing in O.C.G.A. § 17-7-93(b) changed this. *Simmons v. State*, No. A11A2093, 2012 Ga. App. LEXIS 320 (Mar. 22, 2012).

Oral sentence not reduced to writing could be changed with notice to defendant. — Although a magistrate who was appointed to preside at a county drug court pursuant to O.C.G.A. § 15-1-9.1(b)(2) had authority to accept a

defendant's guilty plea to marijuana possession, the superior court judge had the power to set aside the sentence, which was not reduced to writing, pursuant to O.C.G.A. § 17-7-93(b), give notice of intent to impose a harsher sentence, and allow the defendant to withdraw the defendant's plea. *Surh v. State*, 303 Ga. App. 380, 693 S.E.2d 501, cert. denied, No. S10C1274, 2010 Ga. LEXIS 705 (Ga. 2010).

Appellate court's reversal did not give right to withdraw plea.

When the defendant pled guilty to aggravated assault, armed robbery, and robbery, and the defendant's aggravated assault convictions and sentences were vacated on appeal, the defendant had no right, on remand, to withdraw the defendant's guilty plea as to the other convictions because there was no basis to find the separate and distinct sentences entered on those convictions were void. *Murray v. State*, 314 Ga. App. 240, 723 S.E.2d 531 (2012).

Guilty plea freely and voluntarily entered.

Defendant voluntarily, knowingly, and intelligently entered into a plea of guilty to, inter alia, aggravated stalking because while the defendant thought the plea involved a reduced charge with no prison time, the defendant's trial counsel gave contradictory evidence, which was supported by the plea proceeding record; additionally, although the prosecutor conducted the plea colloquy and questioned the defendant about the waiver of the defendant's rights, such was not a ground for reversal. *Ransom v. State*, 293 Ga. App. 651, 667 S.E.2d 686 (2008).

Unawareness of waiver of privilege against self incrimination. — While Boykin does not command the use of any precise "magic words" in establishing that a defendant understands the rights the defendant is waiving by pleading guilty, the habeas court erred in finding that the state met the state's burden of establishing that the defendant's guilty plea was made voluntarily, knowingly, and intelligently because the record failed to show that any comment by the trial court, or by defendant's counsel, informed the defendant that by pleading guilty the defendant

would waive the privilege against compulsory self-incrimination. *Arnold v. Howerton*, 282 Ga. 66, 646 S.E.2d 75 (2007).

Misunderstanding or being misled by counsel.

Defendant failed to show that defendant received ineffective assistance of counsel with regard to being coerced or deceived by counsel as to length of sentence that could be imposed, and trial court did not err by denying defendant's motion to withdraw guilty plea entered into, because record did not support defendant's claim that counsel deceived him about the length of the sentence as defendant was advised of the maximum possible sentence and was told that there was no guarantee as to length of sentence that would be imposed. *Brantley v. State*, 290 Ga. App. 764, 660 S.E.2d 846 (2008).

Effective assistance of counsel supported denial of motion to withdraw guilty plea.

Trial court did not abuse the court's discretion in denying a defendant's motion to withdraw the defendant's guilty plea because the defendant failed to prove the prejudice prong of the defendant's ineffectiveness claim since, at the hearing on the motion to withdraw the plea, the defendant proffered no evidence that a deoxyribonucleic acid (DNA) test pursuant to O.C.G.A. § 5-5-41 would have rebutted the state's evidence, regarding defendant's incest conviction pursuant to O.C.G.A. § 16-6-22, that the defendant and the victim were half-siblings; in addition, counsel's strategy to forego a DNA test was one of trial tactics and did not provide a basis on which to find that counsel's representation was deficient. *Hunter v. State*, 294 Ga. App. 583, 669 S.E.2d 533 (2008).

Erroneous denial of motion to withdraw plea.

Trial court erred in denying defendant's motion for an out-of-time appeal of the denial of the defendant's motion to withdraw the defendant's guilty plea. It was obvious that defendant had attempted to appeal the denial of the defendant's motion to withdraw and that the defendant's request for counsel to help the defendant pursue the defendant's appeal had never

been ruled upon; prejudice was presumed and the harmless error analysis did not apply since there had been a total denial of the assistance of counsel. *Stockton v. State*, 298 Ga. App. 84, 679 S.E.2d 109 (2009).

Motion to withdraw plea properly denied.

Based on the plea hearing transcript and the testimony of the defendant's attorney, the trial court was authorized to reject the defendant's claim that the defendant's Alford plea had not been knowing and voluntary and therefore properly denied the defendant's motion to withdraw the plea. The fact that the defendant's interpreter did not testify at the plea withdrawal hearing provided no basis for reversal. *Luviano v. State*, 291 Ga. App. 677, 662 S.E.2d 770 (2008).

Defendant's motion to withdraw a guilty plea was properly denied when the defendant claimed that trial counsel was ineffective by misinforming the defendant that the defendant's sentence would run concurrently with any imposed by Tennessee for a parole violation and that the sentence would be served in Tennessee. The motion had been filed well beyond the term of court in which the defendant was sentenced and thus was outside the trial court's jurisdiction; furthermore, the trial court was entitled to give credit to counsel's testimony and documents indicating that the Georgia and Tennessee sentences were indeed running concurrently and to counsel's testimony that the defendant had been forewarned that the defendant might not be able to serve the sentence in Tennessee. *Maples v. State*, 293 Ga. App. 232, 666 S.E.2d 609 (2008).

As the transcript of a guilty plea hearing showed the defendant knew the rights the defendant was waiving and the possible consequences of a guilty plea to child molestation, the defendant's former counsel testified the defendant expressed no doubts about the guilty plea, and only the defendant's self-serving testimony indicated the defendant was impaired or under duress when the guilty plea was entered, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the plea. Likely *v. State*, 293 Ga. App. 484, 667 S.E.2d 648 (2008).

Trial court properly denied the defendant's motion to withdraw the defendant's guilty plea based on ineffective assistance under the Sixth Amendment. The record showed that trial counsel, who obtained discovery materials, investigated the case, spoke to the victim and other eyewitnesses, and met with the defendant, was adequately prepared to try the case; moreover, the defendant did not show that additional trial preparation would likely have changed reasonable counsel's advice regarding the guilty plea or the outcome of a trial. *Hammett v. State*, 297 Ga. App. 235, 676 S.E.2d 880 (2009).

There was no merit to the defendant's argument that a guilty plea was invalid because the defendant, who was 17 at the time of the offense and entered the plea over a year later, did not have the opportunity to speak to the defendant's parent before entry of the plea and because the parent was not present in the courtroom. The defendant cited no authority for this contention, and the trial court made careful inquiry showing that the defendant fully understood the nature of the charges and the rights the defendant was relinquishing; accordingly, the trial court properly denied the defendant's motion to withdraw the defendant's plea on this ground. *Robertson v. State*, 297 Ga. App. 228, 676 S.E.2d 871 (2009), cert. denied, No. S09C1300, 2009 Ga. LEXIS 406 (Ga. 2009).

Because the defendant failed to show the manifest injustice necessary to authorize post-sentence withdrawal of the defendant's guilty plea, the trial court did not err when the court denied the defendant's motion to withdraw. Among other evidence, the transcript showed that the assistant district attorney informed the defendant that the defendant was pleading guilty under the repeat offender statute. *Leonard v. State*, 297 Ga. App. 515, 677 S.E.2d 726 (2009).

Trial court properly denied a defendant's motion to withdraw a guilty plea to voluntary manslaughter. Premitting whether counsel's performance was deficient, the defendant failed to establish a reasonable probability that the defendant would have insisted on a trial if the defendant had always known the defendant

could be sentenced to serve 15 years instead of 10; furthermore, the defendant would have been tried for felony murder had the defendant gone to trial. *Johnson v. State*, 298 Ga. App. 197, 679 S.E.2d 763 (2009).

Because defendant failed to preserve an argument that defendant's guilty plea was voidable as a matter of law under O.C.G.A. § 13-3-20, and because the transcript from the plea hearing showed on its face that the plea was entered knowingly, intelligently, and voluntarily, the trial court properly denied defendant's motion to withdraw the plea. *Boykins v. State*, 298 Ga. App. 654, 680 S.E.2d 665 (2009).

Because a police officer was authorized to stop defendant's vehicle based on a suspicion that defendant had illegally dumped trash, and because defendant consented to a search of the vehicle, the items seized from the vehicle would not have been suppressed; accordingly, defendant's ineffective assistance claim failed, and the trial court properly denied defendant's motion to withdraw defendant's Alford plea. *Bishop v. State*, 299 Ga. App. 241, 682 S.E.2d 201 (2009).

Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea because the state met the state's burden by showing from the record that the defendant was cognizant of the rights the defendant was waiving and of the possible consequences of the defendant's plea, and the defendant confirmed that the defendant had read and fully understood the charges pending against the defendant and understood that by pleading guilty the defendant gave up the defendant's right to trial by jury; the defendant understood that while the defendant's attorney would make a sentence recommendation, the trial court could sentence the defendant up to the maximum permitted by law, and the defendant testified that no one used force, threats, or promises to make the defendant plead guilty against the defendant's will, that the defendant was satisfied with the services of the defendant's attorney, that the defendant's decision to plead guilty was made freely and voluntarily, that the defendant committed the offenses, and that the facts outlined by the

state were accurate. *Lavendar v. State*, 306 Ga. App. 257, 701 S.E.2d 892 (2010).

Trial court properly denied the defendant's motion to withdraw the defendant's guilty pleas because the defendant failed to show that withdrawal of the defendant's pleas was necessary to correct a manifest injustice, and the trial court determined that a factual basis existed for the pleas pursuant to Ga. Unif. Super. Ct. R. 33.9 and that the defendant understood the nature of the charges to which the defendant was pleading pursuant to Ga. Unif. Super. Ct. R. 33.8(A); the district attorney did not misstate the law when the district attorney advised the defendant that a defendant in a case when the state was seeking the death penalty did not have an absolute right to withdraw the defendant's guilty plea before judgment was pronounced. *Loyd v. State*, 288 Ga. 481, 705 S.E.2d 616 (2011), cert. dismissed, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Because the defendant declined the opportunity at a plea hearing to discuss any concerns with counsel's representation, the defendant failed to demonstrate that counsel was ineffective; therefore, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the defendant's plea on that basis. *Norwood v. State*, 311 Ga. App. 815, 717 S.E.2d 316 (2011).

Withdrawal after term of court when guilty plea entered. — Trial court properly held that it lacked jurisdiction to entertain a defendant's motion to withdraw guilty plea because term of court at which the guilty plea was entered had expired; moreover, authority to modify sentences under O.C.G.A. § 17-10-1(f) did not include power to vacate conviction on which the sentence was based. *Ellison v. State*, 283 Ga. 461, 660 S.E.2d 373 (2008).

Failure to advise of effect on immigration status was not basis to set aside plea. — Denial of the defendant's

motion for an out-of-time appeal was proper because the defendant failed to show that the defendant's guilty plea was not knowingly and voluntarily entered, and, inter alia, the record showed that the defendant understood the rights the defendant was waiving and the possible consequences of the plea; the effect of the plea on the defendant's immigration status was a "collateral consequence" of the plea, and any failure to advise the defendant of this effect pursuant to O.C.G.A. § 17-7-93(c) was not a basis to set aside the plea. The state was not required to show that Ga. Unif. Super. Ct. R. 33.8 was recited to the letter to rebut an attack on a guilty plea. *Smith v. State*, 298 Ga. App. 458, 680 S.E.2d 516 (2009), aff'd, 287 Ga. 391, 697 S.E.2d 177 (2010).

Although a trial court did not comply with O.C.G.A. § 17-7-93(c) and Ga. Unif. Super. Ct. R. 33.8(C)(2) when the court failed to advise a resident alien that the alien's guilty but mentally ill plea could have an impact on immigration status, the immigration consequences were collateral consequences, the asserted fact that defendant was not a citizen was not apparent from the record, there was no record evidence that defendant was not aware of the potential immigration consequences from some other source and, therefore, defendant did not show resulting harm or manifest injustice. *Smith v. State*, 287 Ga. 391, 697 S.E.2d 177 (2010).

Evidence of withdrawn guilty plea improperly admitted. — Defendant testified to having no knowledge of a syringe or methamphetamine found by police; the codefendant's counsel impeached the defendant on cross-examination with evidence of the defendant's withdrawn guilty plea to possession of methamphetamine. As evidence of a withdrawn guilty plea was inadmissible under O.C.G.A. § 17-7-93(b), and it could not be said that this evidence did not affect the verdict, the defendant was entitled to a new trial. *Bertholf v. State*, 298 Ga. App. 612, 680 S.E.2d 652 (2009).

RESEARCH REFERENCES

ALR. — Court's duty to advise sex offender as to sex offender registration con-

sequences or other restrictions arising from plea of guilty, or to determine that

offender is advised thereof, 41 ALR6th 141.

17-7-93. (Effective January 1, 2013. See note.) Reading of indictment or accusation; answer of accused to charge; recodation of “guilty” plea and pronouncement of judgment; withdrawn guilty pleas; pleas by immigrants.

(a) Upon the arraignment of a person accused of committing a crime, the indictment or accusation shall be read to him and he shall be required to answer whether he is guilty or not guilty of the offense charged, which answer or plea shall be made orally by the accused person or his counsel.

(b) If the person pleads “guilty,” the plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce the judgment of the law upon the person in the same manner as if he or she had been convicted of the offense by the verdict of a jury. At any time before judgment is pronounced, the accused person may withdraw the plea of “guilty” and plead “not guilty.”

(c) In addition to any other inquiry by the court prior to acceptance of a plea of guilty, the court shall determine whether the defendant is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status. This subsection shall apply with respect to acceptance of any plea of guilty to any state offense in any court of this state or any political subdivision of this state. (Laws 1833, Cobb’s 1851 Digest, p. 834; Code 1863, § 4524; Code 1868, § 4543; Code 1873, § 4636; Code 1882, § 4636; Penal Code 1895, § 946; Penal Code 1910, § 971; Code 1933, § 27-1404; Ga. L. 2000, p. 808, § 1; Ga. L. 2011, p. 99, § 31/HB 24.)

The 2011 amendment, effective January 1, 2013, in subsection (b), inserted “or she” in the first sentence and substituted “not guilty.” for “not guilty”; and the former plea shall not be admissible as evidence against him at his trial.” at the end of the last sentence. See editor’s note for applicability.

Editor’s notes. — This Code section, as set forth above, is effective on January 1, 2013. For the version of this Code section effective until that date, see the bound volume.

Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, “Evidence,” see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

17-7-95. Plea of nolo contendere in noncapital felony cases; imposition of sentence; use of plea in other proceedings; use of plea to effect civil disqualifications; imposition of sentence upon plea deemed jeopardy.

JUDICIAL DECISIONS

Disqualification from public office.

In a case in which defendant appealed a conviction for false swearing, in violation of O.C.G.A. § 16-10-71(a), challenging the sufficiency of the evidence, the state failed to prove that defendant had the requisite criminal intent to support the conviction when defendant signed a declarations of candidacy for county commissioner as set forth in O.C.G.A. §§ 21-2-132 and 21-2-153. Pursuant to O.C.G.A. § 17-7-95(c), a judgment imposing a sentence following a plea of nolo contendere was considered a conviction for some purposes; however, such a conviction did not disqualify defendant from holding public office or otherwise deprive defendant of any civil or political rights, and there was no evidence that defendant intended to

deceive the election board or the voters as defendant believed that the 1986 nolo contendere conviction to a charge of aggravated assault was generally known in the county. *Spillers v. State*, 299 Ga. App. 854, 683 S.E.2d 903 (2009).

Admission of conviction on plea as impeachment evidence.

Defendant was properly prevented from impeaching the credibility of the victim's friend as a witness based on the witness's nolo contendere plea to misdemeanor shoplifting because when the legislature enacted O.C.G.A. § 17-7-95(c), which prohibited the use of such a plea in any other court for any purpose, the statute did not carve out an exception for impeachment. *Hooper v. State*, 284 Ga. 824, 672 S.E.2d 638 (2009).

ARTICLE 6

DEMURRERS, MOTIONS, AND SPECIAL PLEAS AND EXCEPTIONS

PART 1

GENERAL PROVISIONS

17-7-110. Time for filing pretrial motions.

Law reviews. — For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide

to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U. L. Rev. 995 (2007).

JUDICIAL DECISIONS

Oral motion to dismiss indictment properly denied. — A trial court properly denied defendant's oral motion in arrest of judgment or motion to dismiss or general demurrer, made after the jury was sworn but before the trial began, as while

the nolle pros of the co-indictee could have been drawn more explicitly, considering it in context and in light of a subsequent indictment, which only contained one count against the co-indictee, there was no intent shown that the charges against

defendant required reindictment. *Atkins v. State*, 291 Ga. App. 863, 663 S.E.2d 286 (2008).

Special demurrers to indictment.

An accusation was not fatally defective because the accusation informed the defendants of the charges against them and protected them against another prosecution for the same offense, and they could not admit that they passed in an area defined by markings as a no-passing zone without being guilty of the crime charged. Moreover, to the extent that the defendants' attack on the accusation could be read as a special demurrer, seeking greater specificity, it was waived by their failure to raise the issue within 10 days after they pled to the accusation. *Haynes-Turner v. State*, 289 Ga. App. 652, 658 S.E.2d 203 (2008).

Because defendant argued that the accusation charging defendant with two traffic violations failed to charge any offense, the trial court did not err in considering defendant's demurrer on the merits even though defendant's motion was filed more than 10 days after defendant waived arraignment. *State v. Shabazz*, 291 Ga. App. 751, 662 S.E.2d 828 (2008).

Defendants' contention that a felony murder indictment was deficient because it did not contain all the essential elements of the underlying crime of aggravated assault was, in essence, a special demurrer seeking greater specificity with regard to the predicate felony. Pursuant to O.C.G.A. § 17-7-110, the defendant's failure to file a timely special demurrer seeking additional information constituted a waiver of the right to be tried on a perfect indictment. *Dasher v. State*, 285 Ga. 308, 676 S.E.2d 181 (2009).

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion for a new trial on the ground that the indictments were fatally flawed because the indictments did not specifically allege the required element of force in charging rape because by alleging "unlawful" carnal knowledge during 1992 to 1995, the indictment asserted a charge of forcible rape under the law in effect prior to the 1996 amendment, therefore, the indictment did establish cognizable

charges. Additionally, the defendant filed no special demurrers as to the form of the indictment and, thus, waived any argument in that regard. *Flournoy v. State*, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

Because the defendant did not file a timely special demurrer to the indictment or a timely motion in arrest of judgment, the defendant waived any claim that could have been raised via special or general demurrer. *Kirt v. State*, 309 Ga. App. 227, 709 S.E.2d 840 (2011).

Failure to file timely special demurrer. — Defendant's motions for a new trial and in arrest of judgment challenging the wording of the indictment charging the defendant with aggravated assault, O.C.G.A. § 16-5-21(a)(2), (3), were properly denied because the defendant could not have admitted the allegations of the indictment without admitting that the defendant was guilty of a crime, and, under O.C.G.A. § 17-7-110, having failed to file a timely special demurrer, the defendant waived the right to a perfect indictment. *McDaniel v. State*, 298 Ga. App. 558, 680 S.E.2d 593 (2009).

Failure to file special demurrer to indictment waived later challenge. — In a prosecution for felony murder and multiple armed robberies, as the defendant did not file a special demurrer seeking greater specificity with regard to the predicate felony, i.e., the name of the armed robbery victim, to the extent the defendant's merger argument alleged insufficiency of the indictment due to the state's failure to specify which armed robbery count was the underlying offense for the felony murder charge, it was waived. *Henderson v. State*, 285 Ga. 240, 675 S.E.2d 28 (2009).

Defendant waived defendant's right to be tried under a perfect indictment because the defendant did not file a special demurrer within 10 days after the arraignment as required by O.C.G.A. § 17-7-110. Additionally, to the extent defendant's motion was one in arrest of judgment, the motion was untimely because it was not filed in the same term of court as the judgment as required by O.C.G.A. § 17-9-61. *Thompson v. State*, 286 Ga. 889, 692 S.E.2d 379 (2010), overruled on other grounds, *State v. Kelly*, 290 Ga. 29, 718 S.E.2d 232 (2011).

Demand remained effective when matter transferred to another court.

— Statutory demand for a speedy trial pursuant to O.C.G.A. § 17-7-110 was effective when the demand was first filed in a court that was later abolished as that court was a constitutional court with jury jurisdiction and two terms of court; the defendant's demand remained effective following the transfer of the criminal matter to another court. *State v. Reid*, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Section did not apply. — Motion for discharge and acquittal based on the constitutional speedy trial right, and a renewal of that motion, were timely filed by the defendant where both motions were filed prior to the time of trial; the time limitations under O.C.G.A. § 17-7-110 were not applicable. *State v. Reid*, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Cited in *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

17-7-111. Demurrers and special pleas to be in writing; right to plead “not guilty” if demurrer or plea denied.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CHALLENGE TO INDICTMENT

General Consideration

Oral renewed motion for discharge and acquittal proper. — Motion for discharge and acquittal based on the constitutional speedy trial right, which was orally renewed by the defendant at the time of trial, was proper as such a motion did not have to be in writing pursuant to O.C.G.A. § 17-7-111. *State v. Reid*, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Challenge to Indictment

Defendant's oral motion to quash indictment was ineffective.

A trial court properly denied defen-

dant's oral motion in arrest of judgment or motion to dismiss or general demurrer, made after the jury was sworn but before trial began, as while the nolle pros of the co-indictee could have been drawn more explicitly, considering it in context and in light of a subsequent indictment, which only contained one count against the co-indictee, there was no intent shown that the charges against defendant required reindictment. *Atkins v. State*, 291 Ga. App. 863, 663 S.E.2d 286 (2008).

17-7-112. Plea of misnomer.

JUDICIAL DECISIONS

Misnomer not sufficiently shown. — Defendant's argument that a trial court erred by rejecting the defendant's "Special Plea of Misnomer" filed pursuant to O.C.G.A. § 17-7-112 was without merit because the case was proceeding accord-

ing to the accusation filed by the solicitor pursuant to O.C.G.A. § 17-7-71(b)(1), which contained the defendant's correct name. *Switlick v. State*, 295 Ga. App. 849, 673 S.E.2d 323 (2009).

17-7-113. Time for making exception to form of indictment or accusation.**JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION****General Consideration****When demurrers, motions, and pleas to be made.**

Trial court properly denied a defendant's motion to quash when the indictment quoted the language of O.C.G.A. § 16-9-1 and identified the offense as forgery in the first degree, and further identified the date and place of the offense as well as the bank on which the purported check was drawn and the check number.

The defendant could not reasonably claim that the defendant was surprised by evidence at trial or was unable to prepare a defense, or that the defendant risked future prosecution for the same offense; the challenge at best went to the form of the accusation and should have been raised via special demurrer prior to trial. *Wilkes v. State*, 293 Ga. App. 724, 667 S.E.2d 705 (2008), overruled on other grounds, *Clay v. State*, 2012 Ga. LEXIS 301 (Ga. 2012).

PART 2**INSANITY AND MENTAL INCOMPETENCY****17-7-129. Mental capacity to stand trial; release of competency evaluation to prosecuting attorney.**

(a) When information becomes known to the court sufficient to raise a bona fide doubt regarding the accused's mental competency to stand trial, the court has a duty, sua sponte, to inquire into the accused's mental competency to stand trial. The court may order the Department of Behavioral Health and Developmental Disabilities to conduct an evaluation of the accused's competency. If the court determines that it is necessary to have a trial on the issue of competency, the court shall follow the procedures set forth in Code Section 17-7-130. The court's order shall set forth those facts which give rise to its bona fide doubt as to the accused's mental competency to stand trial. The evaluation of the Department of Behavioral Health and Developmental Disabilities shall be submitted to the court, and the court shall submit such evaluation to the attorney for the accused or, if pro se, to the accused, but otherwise, the report shall remain under seal.

(b) If the court orders a competency evaluation and the accused serves notice of a special plea of mental incompetency to stand trial or raises the issue of insanity, the court shall release the competency evaluation to the prosecuting attorney. Such evaluation shall not be released to any other person absent a court order. (Code 1981, § 17-7-129, enacted by Ga. L. 2011, p. 372, § 1/HB 421.)

Effective date. — This Code section became effective July 1, 2011.

17-7-130. Proceedings upon plea of mental incompetency to stand trial.

(a) As used in this Code section, the term:

(1) “Child” means an accused person under the jurisdiction of the superior court pursuant to Code Section 15-11-28.

(2) “Civil commitment” means the accused’s involuntary inpatient or outpatient commitment pursuant to Chapter 3 or 4 of Title 37, as appropriate.

(3) “Court” means the court which has jurisdiction over the criminal charges against the accused.

(4) “Department” means the Department of Behavioral Health and Developmental Disabilities.

(5) “Developmental disability” shall have the same meaning as set forth in paragraph (8) of Code Section 37-1-1.

(6) “Inpatient” shall have the same meaning as in paragraph (9.1) of Code Section 37-3-1; provided, however, that as applied to a child for purposes of this Code section, the term shall mean a child who is mentally ill or has a developmental disability and is in need of involuntary placement.

(7) “Nonviolent offense” means any offense other than a violent offense.

(8) “Outpatient” shall have the same meaning as in paragraph (12.1) of Code Section 37-3-1, provided that:

(A) As applied to a child for purposes of this Code section, the term shall mean a child who is mentally ill or has a developmental disability and is in need of involuntary placement; and

(B) The court determines that the accused meets the criteria for release on bail or other pre-trial release pursuant to Code Section 17-6-1.

(9) “Serious violent felony” shall have the same meaning as set forth in Code Section 17-10-6.1.

(10) “Sexual offense” shall have the same meaning as set forth in Code Section 17-10-6.2.

(11) “Violent offense” means:

(A)(i) A serious violent felony;

- (ii) A sexual offense;
- (iii) Criminal attempt to commit a serious violent felony;
- (iv) Criminal attempt to commit a sexual offense;
- (v) Aggravated assault;
- (vi) Hijacking of a motor vehicle or an aircraft;
- (vii) Aggravated battery;
- (viii) Aggravated stalking;
- (ix) Arson in the first degree or in the second degree;
- (x) Stalking;
- (xi) Fleeing and attempting to elude a police officer;
- (xii) Any offense which involves the use of a deadly weapon or destructive device; and

(B) Those felony offenses deemed by the court to involve an allegation of actual or potential physical harm to another person.

(b)(1) If an accused files a motion requesting a competency evaluation, the court may order the department to conduct an evaluation by a physician or licensed psychologist to determine the accused's mental competency to stand trial and, if such physician or licensed psychologist determines the accused to be mentally incompetent to stand trial, to make recommendations as to restoring the accused to competency. If the accused is a child, the department shall be authorized to place such child in a secure facility designated by the department. The department's evaluation shall be submitted to the court, and the court shall submit such evaluation to the attorney for the accused or if pro se, to the accused, but otherwise, the evaluation shall be under seal and shall not be released to any other person absent a court order.

(2) If the accused files a special plea alleging that the accused is mentally incompetent to stand trial, it shall be the duty of the court to have a bench trial, unless the state or the accused demands a special jury trial, to determine the accused's competency to stand trial. Once a special plea has been filed, the court shall submit the department's evaluation to the prosecuting attorney.

(c) If the court finds the accused is mentally incompetent to stand trial, the court may order a department physician or licensed psychologist to evaluate and diagnose the accused as to whether there is a substantial probability that the accused will attain mental competency to stand trial in the foreseeable future. The court shall retain jurisdiction over the accused and shall transfer the accused to the physical

custody of the department. At its discretion, the court may allow the evaluation to be performed on the accused as an outpatient if the accused is charged with a nonviolent offense. Such evaluation shall be performed within 90 days after the department has received actual custody of an accused or, in the case of an outpatient, a court order requiring evaluation of an accused. If the accused is a child, the department shall be authorized to place such child in a secure facility designated by the department. If the evaluation shows:

(1) That the accused is mentally competent to stand trial, the department shall immediately report that determination and the reasons therefor to the court, and the court shall submit such determination to the attorney for the accused or, if pro se, to the accused and to the prosecuting attorney. The accused shall be returned to the court as provided for in subsection (d) of this Code section;

(2) That the accused is mentally incompetent to stand trial and that there is not a substantial probability that the accused will attain competency in the foreseeable future, the court shall follow the procedures set forth in subsection (e) of this Code section for civil commitment or release; or

(3) That the accused is mentally incompetent to stand trial but there is a substantial probability that the accused will attain competency in the foreseeable future, by the end of the 90 day period, or at any prior time, the department shall report that finding and the reasons therefor to the court and shall retain custody over the accused for the purpose of continued treatment for an additional period not to exceed nine months; provided, however, that if the accused is charged with a misdemeanor offense or a nonviolent offense, the court shall retain jurisdiction over the accused but may, in its discretion, allow continued treatment to be done on an outpatient basis by the department. The department shall monitor the accused's outpatient treatment for the additional period not to exceed nine months. If, by the end of the nine-month period or at any prior time the accused's condition warrants, the accused is still determined by the department physician or licensed psychologist to be mentally incompetent to stand trial, irrespective of the probability of recovery in the foreseeable future, the department shall report that finding and the reasons therefor to the court. The court shall then follow the procedures in subsection (e) of this Code section for civil commitment or release.

(d)(1) If the department's physician or licensed psychologist determines at any time that the accused is mentally competent to stand trial, the department shall notify the court, and the accused shall be discharged into the custody of a sheriff of the jurisdiction of the court

unless the charges which led to the evaluation or civil commitment have been dismissed, in which case, the accused shall be discharged from the department. In the event a sheriff does not appear and take custody of the accused within 20 days after notice to the appropriate sheriff of the jurisdiction of the court, the presiding judge of the court, and the prosecuting attorney for the court, the department shall itself return the accused to one of the court's detention facilities, and the cost of returning the accused shall be paid by the county in which the court is located. All notifications under this paragraph shall be sent by certified mail or statutory overnight delivery, return receipt requested. As an alternative to returning the accused to the sheriff of the jurisdiction of the court, the department may hold the accused at the department's secure facility instead of at the court's detention facilities whenever a department physician or licensed psychologist provides written notice to the court that such detention in the court's facilities would be detrimental to the well-being of the accused. Such alternative detention shall continue only until the date of the accused's trial. Regardless of where the accused is held, the court shall hold a bench trial to determine the accused's mental competency to stand trial within 45 days of receiving the department's evaluation or, if demanded, shall conduct a special jury trial within six months of receiving the department's evaluation.

(2) If the accused is an outpatient and the department's physician or licensed psychologist determines at any time that the accused is mentally competent to stand trial, the accused may remain in the community under conditions of bond or other conditions ordered by the court, if any, until the date of the accused's trial, which shall be within 45 days of the court receiving the department's evaluation if tried by the court or within six months of receiving the department's evaluation if a special jury trial is demanded.

(e) If the evaluation performed pursuant to subsection (c) of this Code section shows that the accused is mentally incompetent to stand trial and that there is not a substantial probability that the accused will attain competency in the foreseeable future:

(1) If the accused is charged with a misdemeanor, the department shall return the physical custody of the accused to a sheriff of the jurisdiction of the court; provided, however, that as an alternative to returning the accused to the sheriff of the jurisdiction of the court, the department may hold the accused at the department's secure facility instead of at the court's detention facilities whenever a department physician or licensed psychologist provides written notice to the court that such detention in the court's facilities would be detrimental to the well-being of the accused. Such alternative detention shall continue only until the date of the accused's trial. Regardless of where

the accused is held, the court shall, within 45 days of receiving the department's evaluation:

(A) Consider entry of a nolle prosequi of the charges pursuant to Code Section 17-8-3 and, if the accused is not a child, request that the department petition the probate court of the jurisdiction of the accused's residence for civil commitment of the accused; or

(B) If the court finds that the accused does not meet the criteria for civil commitment, the accused shall be released in accordance with the provisions of Chapter 6 of this title; or

(2) If the accused is charged with a felony, the department shall return the physical custody of the accused to a sheriff of the jurisdiction of the court; provided, however, that as an alternative to returning the accused to the sheriff of the jurisdiction of the court, the department may hold the accused at the department's secure facility instead of at the court's detention facilities whenever a department physician or licensed psychologist provides written notice to the court that such detention in the court's facilities would be detrimental to the well-being of the accused. Such alternative detention shall continue only until the date of the accused's trial. The department shall report to the court its finding regarding the accused's mental competency to stand trial, the reasons therefor, and its opinion as to whether the accused currently meets the criteria for civil commitment. The court may order an independent evaluation of the accused by a court appointed licensed clinical psychologist or psychiatrist, who shall report to the court in writing as to the current mental and emotional condition of the accused. Regardless of where the accused is held, the court shall, within 45 days of receiving the department's evaluation:

(A) Consider entry of a nolle prosequi of the charges pursuant to Code Section 17-8-3 and, if the accused is not a child, request that the department petition the probate court of the jurisdiction of the accused's residence for civil commitment of the accused; or

(B) Retain jurisdiction of the accused and conduct a trial at which the court shall hear evidence and consider all psychiatric and psychological evaluations submitted to the court and determine whether the state has proved by clear and convincing evidence that the accused meets the criteria for civil commitment. The burden of proof in such trials shall be upon the state. Following the trial:

(i) If the court finds that the accused does not meet the criteria for civil commitment, the accused shall be released in accordance with the provisions of Chapter 6 of this title;

(ii) If the court finds that the accused meets the criteria for civil commitment, the judge may issue an order civilly commit-

ting the accused, and the court shall order the civil commitment to be on an inpatient or outpatient placement; provided, however, that if the accused is a child, the department shall be authorized to place such child in a secure facility designated by the department;

(iii) If the accused is civilly committed pursuant to division (ii) of this subparagraph and was charged with a nonviolent offense, the court may order civil commitment on an annual basis, but in no case for a period to exceed the maximum period for which the accused could have been sentenced on the most serious nonviolent offense charged or a period to exceed five years, whichever is less, provided that civil commitment shall be reevaluated by a department physician or licensed psychologist on an annual basis;

(iv) If the accused is civilly committed pursuant to division (ii) of this subparagraph and was charged with a violent offense, the court may order civil commitment on an annual basis, but in no case for a period to exceed the maximum period for which the accused could have been sentenced on the most serious violent offense charged, provided that civil commitment shall be reevaluated by a department physician or licensed psychologist on an annual basis;

(v) Following the civil commitment pursuant to division (ii) of this subparagraph, a department physician or licensed psychologist shall submit to the court his or her annual evaluation as to whether the civilly committed accused continues to meet the criteria for civil commitment. The court shall mail the annual evaluation to the attorney for the accused or, if pro se, to the accused and to the prosecuting attorney. The court shall review the case annually and enter the appropriate order to renew the civil commitment, to change the civil commitment status, or, in the event the charges are dismissed, to transfer the jurisdiction of the case to the probate court of the jurisdiction of the accused's residence for further civil commitment; provided, however, that after the department submits its annual evaluation, if the state or the accused requests a hearing regarding civil commitment, the court shall hold a hearing on such issue; and

(vi) An accused who is civilly committed pursuant to division (ii) of this subparagraph may make an application for release from civil commitment but shall only be released from that civil commitment by order of the court in accordance with the procedures specified in paragraphs (1) through (3) of subsection (f) of Code Section 17-7-131, except that the burden of proof in such release hearing shall be on the state, and if the civilly committed

accused is indigent, the accused may petition the court to have an evaluation performed by a physician or licensed psychologist of the accused's choice, and the court may order the cost of such evaluation be paid for by the county.

(f) If, at any time, the department's physician or licensed psychologist determines that the accused is mentally incompetent to stand trial but later determines that the accused is mentally competent to stand trial, the court shall be so notified and shall order the accused detained or discharged in accordance with paragraph (1) of subsection (d) of this Code section. Any accused determined by a department physician or licensed psychologist to be mentally competent to stand trial and returned to the court as provided in subsection (d) of this Code section shall again be entitled to file a special plea as provided for in this Code section.

(g) If an accused is determined by a department physician or licensed psychologist to be mentally incompetent to stand trial, whether or not civilly committed pursuant to this Code section, the state may file at any time a motion for rehearing on the issue of the accused's mental competency to stand trial. If the state's motion is granted, the case shall proceed as provided in this Code section.

(h) Nothing in this Code section shall prevent the accused or the state from seeking a court order for a nondepartment mental competency evaluation of the accused at the cost of the movant. If a nondepartment mental competency evaluation is ordered, the court shall abide by the time frames for trial as set forth in this Code section unless the court determines, for good cause shown, that such time frames require adjustment for a nondepartment evaluation.

(i) The "Crime Victims' Bill of Rights," as set forth in Chapter 17 of this title, shall be applicable to any judicial proceeding held pursuant to this Code section, and notice shall be provided to any victim as set forth in such chapter. (Orig. Code 1863, § 4195; Code 1868, § 4234; Code 1873, § 4299; Code 1882, § 4299; Penal Code 1895, § 951; Penal Code 1910, § 976; Code 1933, § 27-1502; Ga. L. 1977, p. 1293, § 3; Ga. L. 1982, p. 3, § 17; Ga. L. 1995, p. 1250, §§ 1.1, 1.2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2007, p. 663, § 1/SB 190; Ga. L. 2009, p. 453, § 3-2/HB 228; Ga. L. 2010, p. 286, § 12/SB 244; Ga. L. 2011, p. 372, § 2/HB 421.)

The 2009 amendment, effective July 1, 2009, substituted "Department of Behavioral Health and Developmental Disabilities" for "Department of Human Resources" throughout this Code section.

The 2010 amendment, effective July 1, 2010, in subsection (a), added paragraph (a)(1), redesignated former paragraph (a)(1) as present paragraph (a)(2),

added paragraph (a)(3), redesignated former paragraphs (a)(2) through (a)(4) as present paragraphs (a)(4) through (a)(6), respectively, added the proviso at the end of paragraph (a)(4), and rewrote present paragraph (a)(6); in the second sentence of subsection (b), inserted "and if the defendant is a child, the department shall be authorized to place such defendant in a

secure hospital or secure community facility designated by the department” and substituted “subparagraph (a)(5)(A)” for “subparagraph (a)(3)(A)”; substituted “If the defendant is not a child, refer” for “Refer” at the beginning of paragraph (d)(1); and added the proviso at the end of subparagraph (d)(2)(B).

The 2011 amendment, effective July 1, 2011, rewrote this Code section.

Law reviews. — For note and comment, “Hope for the Best and Prepare for the Worst: The Capital Defender’s Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials,” see 23 Ga. St. U. L. Rev. 995 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PROCEDURE

APPLICATION

JURY INSTRUCTIONS AND RESPONSIBILITIES

General Consideration

One mentally competent at time crime committed is culpable.

— Even if a habeas corpus petitioner was incompetent at the time of trial and is incompetent today, if the petitioner could be rendered competent in the future (even by forcing the petitioner to take medication), the petitioner could be lawfully tried, convicted, and sentenced to death once again because someone who is mentally competent (sane) when he or she commits a crime is culpable for that offense, even if his or her later incompetency prevents him or her (perhaps only temporarily) from being tried for the offense. Perkins v. Hall, 288 Ga. 810, 708 S.E.2d 335 (2011).

Directed verdict in competency trial.

— Trial court did not err in denying the defendant’s motion for a directed verdict under O.C.G.A. § 9-11-50 in the defendant’s competency trial because the evidence on competency was in conflict; even though the defendant’s expert witness opined that the defendant was not competent to stand trial, the state’s expert testified that the defendant was competent to do so. Smith v. State, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Procedure

Failure to order hearing held error.

With regard to a defendant’s convictions for aggravated assault, terroristic threats, and burglary, the judgment of conviction was reversed and the case was remanded to the trial court since the trial court erred

by failing to conduct a competency hearing. Although defense counsel never filed a written plea that the defendant was mentally incompetent to stand trial, based on defense counsel’s detailed concerns regarding the defendant’s competency and the defendant’s absolute refusal to be evaluated, the trial court should have continued the matter and conducted a competency hearing. Phelps v. State, 296 Ga. App. 362, 674 S.E.2d 620 (2009).

Excusing jurors from competency hearing.

— Trial court did not abuse the court’s discretion by excusing a potential juror during jury selection for a competency hearing and by failing to excuse a second juror because the first juror expressed an inability to judge the defendant’s competency on the merits, and after the second juror expressed a willingness to be fair, the trial court found that the juror had no fixed opinion about the defendant’s guilt. Smith v. State, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Procedural default when a failure to pursue competency.

— Habeas court correctly concluded that the petitioner’s claim that the petitioner was tried while incompetent was barred by procedural default under O.C.G.A. § 9-14-48(d) because the claim was not pursued to a conclusion at trial and was not raised on direct appeal; for purposes of determining whether the procedural default doctrine will apply, there is no meaningful distinction between the failure to exercise a defendant’s right to have his or her competence determined in the trial court and the failure to

exercise a defendant's additional right to have a competency determination evaluated on appeal, and substantive claims of incompetence to stand trial will continue to be subject to procedural default in Georgia. Perkins v. Hall, 288 Ga. 810, 708 S.E.2d 335 (2011).

Application

Finding of competence to stand trial affirmed.

Defendant did not file a special plea of incompetence to stand trial. As the defendant's colloquy with the trial judge indicated that the defendant understood the charges, the possible punishment, and the trial process, and that the defendant was helping counsel to prepare the defense; and as the psychologist who conducted the first competency evaluation opined that the defendant was probably exaggerating symptoms of incompetency, the defendant was properly found competent to stand trial and was not entitled to a second

competency evaluation. Wadley v. State, 295 Ga. App. 556, 672 S.E.2d 504 (2009), cert. denied, No. S09C0811, 2009 Ga. LEXIS 255 (Ga. 2009).

Jury Instructions and Responsibilities

No error in declining to charge jury on insanity. — Because the defendant failed to present any evidence from which a jury could conclude that the defendant did not know right from wrong when the defendant committed the criminal acts, the trial court did not err in declining to charge the jury pursuant to O.C.G.A. § 17-7-131(b)(1)(C) that the defendant could be found not guilty by reason of insanity under O.C.G.A. § 16-3-2; the defendant introduced no evidence of insanity, only lay witness testimony about generalized problems. McBride v. State, No. A11A1734, 2012 Ga. App. LEXIS 272 (Mar. 12, 2012).

17-7-130.1. Evidence as to defendant's sanity at time of offense; examination and testimony by psychiatrist or psychologist.

Law reviews. — For annual survey on criminal law, see 61 Mercer L. Rev. 79 (2009).

JUDICIAL DECISIONS

Self-incrimination protection.

It was not error to admit a defendant's statements to an expert appointed pursuant to O.C.G.A. § 17-7-130.1 to examine the defendant upon the defendant's assertion of an insanity defense because: (1) the state had a statutory right, under O.C.G.A. § 17-7-130.1, to call the expert to rebut the testimony of the defendant's expert regarding the defendant's mental state at the time of the crimes charged; (2) the defendant had no Sixth Amendment right to counsel during the expert's examination or Fifth Amendment right requiring the repetition of the defendant's Miranda rights during the interview with the appointed expert; and (3) the defendant's counsel was aware of the psychiatric interview and chose not to attend.

Walker v. State, 290 Ga. 467, 722 S.E.2d 72 (2012).

Insanity defense inappropriate when defendant claim sleep walking.

— In a malice murder prosecution, as the defendant claimed he unintentionally killed his wife while sleepwalking, and expert testimony supported this claim, the trial court erred in classifying the defense as an insanity defense under O.C.G.A. § 17-7-130.1, and in instructing the jury on the defense of insanity, as this detracted from the defendant's primary defense that he did not commit the acts in question voluntarily and with criminal intent. Smith v. State, 284 Ga. 33, 663 S.E.2d 155 (2008).

Ineffective assistance of counsel for failing to plead guilty but mentally

retarded not found. — With regard to a defendant's convictions for kidnapping, aggravated sodomy, and aggravated sexual battery, the defendant was not rendered ineffective assistance of counsel as a result of trial counsel's decision not to file a plea of guilty but mentally retarded and, instead, attack the credibility of the victim, as trial counsel's decision as to which theory of defense to pursue was a matter of trial strategy and tactics that was not unreasonable and thus did not constitute ineffective assistance. *Hampton v. State*, 294 Ga. App. 857, 670 S.E.2d 502 (2008).

17-7-131. Proceedings upon plea of insanity or mental incompetency at time of crime.

(a) For purposes of this Code section, the term:

(1) "Insane at the time of the crime" means meeting the criteria of Code Section 16-3-2 or Code Section 16-3-3. However, the term shall not include a mental state manifested only by repeated unlawful or antisocial conduct.

(2) "Mentally ill" means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. However, the term "mental illness" shall not include a mental state manifested only by repeated unlawful or antisocial conduct.

(3) "Mentally retarded" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.

(b)(1) In all cases in which the defense of insanity is interposed, the jury, or the court if tried by it, shall find whether the defendant is:

(A) Guilty;

(B) Not guilty;

(C) Not guilty by reason of insanity at the time of the crime;

(D) Guilty but mentally ill at the time of the crime, but the finding of guilty but mentally ill shall be made only in felony cases; or

(E) Guilty but mentally retarded, but the finding of mental retardation shall be made only in felony cases.

(2) A plea of guilty but mentally ill at the time of the crime or a plea of guilty but mentally retarded shall not be accepted until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition, and is satisfied that there is a factual basis that the defendant was mentally ill at the time of the offense or mentally retarded to which the plea is entered.

(2.1) A plea of not guilty by reason of insanity at the time of the crime shall not be accepted and the defendant adjudicated not guilty by reason of insanity by the court without a jury until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, has held a hearing on the issue of the defendant's mental condition, and the court is satisfied that the defendant was insane at the time of the crime according to the criteria of Code Section 16-3-2 or 16-3-3.

(3) In all cases in which the defense of insanity is interposed, the trial judge shall charge the jury, in addition to other appropriate charges, the following:

(A) I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to law.

(B) I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be placed in the custody of the Department of Corrections which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities.

(C) I charge you that should you find the defendant guilty but mentally retarded, the defendant will be placed in the custody of the Department of Corrections, which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities.

(c) In all criminal trials in any of the courts of this state wherein an accused shall contend that he was insane or otherwise mentally incompetent under the law at the time the act or acts charged against him were committed, the trial judge shall instruct the jury that they may consider, in addition to verdicts of "guilty" and "not guilty," the additional verdicts of "not guilty by reason of insanity at the time of the crime," "guilty but mentally ill at the time of the crime," and "guilty but mentally retarded."

(1) The defendant may be found "not guilty by reason of insanity at the time of the crime" if he meets the criteria of Code Section 16-3-2 or 16-3-3 at the time of the commission of the crime. If the court or jury should make such finding, it shall so specify in its verdict.

(2) The defendant may be found “guilty but mentally ill at the time of the crime” if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and was mentally ill at the time of the commission of the crime. If the court or jury should make such finding, it shall so specify in its verdict.

(3) The defendant may be found “guilty but mentally retarded” if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. If the court or jury should make such finding, it shall so specify in its verdict.

(d) Whenever a defendant is found not guilty by reason of insanity at the time of the crime, the court shall retain jurisdiction over the person so acquitted and shall order such person to be detained in a state mental health facility, to be selected by the Department of Behavioral Health and Developmental Disabilities, for a period not to exceed 30 days from the date of the acquittal order, for evaluation of the defendant’s present mental condition. Upon completion of the evaluation, the proper officials of the mental health facility shall send a report of the defendant’s present mental condition to the trial judge, the prosecuting attorney, and the defendant’s attorney, if any.

(e)(1) After the expiration of the 30 days’ evaluation period in the state mental health facility, if the evaluation report from the Department of Behavioral Health and Developmental Disabilities indicates that the defendant does not meet the inpatient commitment criteria of Chapter 3 of Title 37 or Chapter 4 of Title 37, the trial judge may issue an order discharging the defendant from custody without a hearing.

(2) If the defendant is not so discharged, the trial judge shall order a hearing to determine if the defendant meets the inpatient commitment criteria of Chapter 3 of Title 37 or Chapter 4 of Title 37. If such criteria are not met, the defendant must be discharged.

(3) The defendant shall be detained in custody until completion of the hearing. The hearing shall be conducted at the earliest opportunity after the expiration of the 30 days’ evaluation period but in any event within 30 days after receipt by the prosecuting attorney of the evaluation report from the mental health facility. The court may take judicial notice of evidence introduced during the trial of the defendant and may call for testimony from any person with knowledge concerning whether the defendant is currently a mentally ill person in need of involuntary treatment, as defined by paragraph (12) of Code Section 37-3-1, or a person with a developmental disability, as defined in paragraph (8) of Code Section 37-1-1, who presents a

substantial risk of imminent harm to himself or herself or others. The prosecuting attorney may cross-examine the witnesses called by the court and the defendant's witnesses and present relevant evidence concerning the issues presented at the hearing.

(4) If the judge determines that the defendant meets the inpatient commitment criteria of Chapter 3 of Title 37 or Chapter 4 of Title 37, the judge shall order the defendant to be committed to the Department of Behavioral Health and Developmental Disabilities to receive involuntary treatment under Chapter 3 of Title 37 or to receive services under Chapter 4 of Title 37. The defendant is entitled to the following rights specified below and shall be notified in writing of these rights at the time of his admission for evaluation under subsection (d) of this Code section. Such rights are:

(A) A notice that a hearing will be held and the time and place thereof;

(B) A notice that the defendant has the right to counsel and that the defendant or his representatives may apply immediately to the court to have counsel appointed if the defendant cannot afford counsel and that the court will appoint counsel for the defendant unless he indicates in writing that he does not desire to be represented by counsel;

(C) The right to confront and cross-examine witnesses and to offer evidence;

(D) The right to subpoena witnesses and to require testimony before the court in person or by deposition from any person upon whose evaluation the decision of the court may rest;

(E) Notice of the right to have established an individualized service plan specifically tailored to the person's treatment needs, as such plans are defined in Chapter 3 of Title 37 and Chapter 4 of Title 37; and

(F) A notice that the defendant has the right to be examined by a physician or a licensed clinical psychologist of his own choice at his own expense and to have that physician or psychologist submit a suggested service plan for the patient which conforms with the requirements of Chapter 3 of Title 37 or Chapter 4 of Title 37, whichever is applicable.

(5)(A) If a defendant appears to meet the criteria for outpatient involuntary treatment as defined in Part 3 of Article 3 of Chapter 3 of Title 37, which shall be the criteria for release on a trial basis in the community in preparation for a full release, the court may order a period of conditional release subject to certain conditions set by the court. The court is authorized to appoint an appropriate

community service provider to work in conjunction with the Department of Behavioral Health and Developmental Disabilities to monitor the defendant's compliance with these conditions and to make regular reports to the court.

(B) If the defendant successfully completes all requirements during this period of conditional release, the court shall discharge the individual from commitment at the end of that period. Such individuals may be referred for community mental health, mental retardation, or substance abuse services as appropriate. The court may require the individual to participate in outpatient treatment or any other services or programs authorized by Chapter 3, 4, or 7 of Title 37.

(C) If the defendant does not successfully complete any or all requirements of the conditional release period, the court may:

(i) Revoke the period of conditional release and return the defendant to a state hospital for inpatient services; or

(ii) Impose additional or revise existing conditions on the defendant as appropriate and continue the period of conditional release.

(D) For any decision rendered under subparagraph (C) of this paragraph, the defendant may request a review by the court of such decision within 20 days of the order of the court.

(E) The Department of Behavioral Health and Developmental Disabilities and any community services providers, including the employees and agents of both, providing supervision or treatment during a period of conditional release shall not be held criminally or civilly liable for any acts committed by a defendant placed by the committing court on a period of conditional release.

(f) A defendant who has been found not guilty by reason of insanity at the time of the crime and is ordered committed to the Department of Behavioral Health and Developmental Disabilities under subsection (e) of this Code section may only be discharged from that commitment by order of the committing court in accordance with the procedures specified in this subsection:

(1) Application for the release of a defendant who has been committed to the Department of Behavioral Health and Developmental Disabilities under subsection (e) of this Code section upon the ground that he does not meet the civil commitment criteria under Chapter 3 of Title 37 or Chapter 4 of Title 37 may be made to the committing court, either by such defendant or by the superintendent of the state hospital in which the said defendant is detained;

(2) The burden of proof in such release hearing shall be upon the applicant. The defendant shall have the same rights in the release hearing as set forth in subsection (e) of this Code section; and

(3) If the finding of the court is adverse to release in such hearing held pursuant to this subsection on the grounds that such defendant does meet the inpatient civil commitment criteria, a further release application by the defendant shall not be heard by the court until 12 months have elapsed from the date of the hearing upon the last preceding application. The Department of Behavioral Health and Developmental Disabilities shall have the independent right to request a release hearing once every 12 months.

(g)(1) Whenever a defendant is found guilty but mentally ill at the time of a felony or guilty but mentally retarded, or enters a plea to that effect that is accepted by the court, the court shall sentence him or her in the same manner as a defendant found guilty of the offense, except as otherwise provided in subsection (j) of this Code section. A defendant who is found guilty but mentally ill at the time of the felony or guilty but mentally retarded shall be committed to an appropriate penal facility and shall be evaluated then treated, if indicated, within the limits of state funds appropriated therefor, in such manner as is psychiatrically indicated for his or her mental illness or mental retardation.

(2) If at any time following the defendant's conviction as a guilty but mentally ill or guilty but mentally retarded offender it is determined that a temporary transfer to the Department of Behavioral Health and Developmental Disabilities is clinically indicated for his or her mental illness or mental retardation, then the defendant shall be transferred to the Department of Behavioral Health and Developmental Disabilities pursuant to procedures set forth in regulations of the Department of Corrections and the Department of Behavioral Health and Developmental Disabilities. In all such cases, the legal custody of the defendant shall be retained by the Department of Corrections. Upon notification from the Department of Behavioral Health and Developmental Disabilities to the Department of Corrections that hospitalization at a Department of Behavioral Health and Developmental Disabilities facility is no longer clinically indicated for his or her mental illness or mental retardation, the Department of Corrections shall transfer the defendant back to its physical custody and shall place such individual in an appropriate penal institution.

(h) If a defendant who is found guilty but mentally ill at the time of a felony or guilty but mentally retarded is placed on probation under the "State-wide Probation Act," Article 2 of Chapter 8 of Title 42, the court may require that the defendant undergo available outpatient

medical or psychiatric treatment or seek similar available voluntary inpatient treatment as a condition of probation. Persons required to receive such services may be charged fees by the provider of the services.

(i) In any case in which the defense of insanity is interposed or a plea of guilty but mentally ill at the time of the felony or a plea of guilty but mentally retarded is made and an examination is made of the defendant pursuant to Code Section 17-7-130.1 or paragraph (2) of subsection (b) of this Code section, upon the defendant's being found guilty or guilty but mentally ill at the time of the crime or guilty but mentally retarded, a copy of any such examination report shall be forwarded to the Department of Corrections with the official sentencing document. The Department of Behavioral Health and Developmental Disabilities shall forward, in addition to its examination report, any records maintained by such department that it deems appropriate pursuant to an agreement with the Department of Corrections, within ten business days of receipt by the Department of Behavioral Health and Developmental Disabilities of the official sentencing document from the Department of Corrections.

(j) In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life. (Orig. Code 1863, § 1314; Code 1868, § 1395; Code 1873, § 1374; Code 1882, § 1374; Penal Code 1895, § 952; Penal Code 1910, § 977; Code 1933, § 27-1503; Ga. L. 1952, p. 205, § 1; Ga. L. 1972, p. 848, § 1; Ga. L. 1977, p. 1293, § 2; Ga. L. 1982, p. 1476, §§ 1, 2; Ga. L. 1984, p. 22, § 17; Ga. L. 1985, p. 283, § 1; Ga. L. 1985, p. 637, §§ 2-4; Ga. L. 1988, p. 1003, § 1; Ga. L. 1989, p. 14, § 17; Ga. L. 1991, p. 780, §§ 1-3; Ga. L. 1992, p. 1328, §§ 2, 3; Ga. L. 2006, p. 765, § 1/SB 398; Ga. L. 2009, p. 453, § 3-2/HB 228; Ga. L. 2011, p. 337, § 9/HB 324.)

The 2009 amendment, effective July 1, 2009, substituted "Department of Behavioral Health and Developmental Disabilities" for "Department of Human Resources" throughout this Code section.

The 2011 amendment, effective July 1, 2011, substituted ", as defined by paragraph (12) of Code Section 37-3-1, or a person with a developmental disability, as

defined in paragraph (8) of Code Section 37-1-1, who presents a substantial risk of imminent harm to himself or herself or others" for "or currently mentally retarded and in need of being ordered to receive services, as those terms are defined by paragraph (12) of Code Section 37-3-1 and Code Section 37-4-40" in the next-to-last sentence of paragraph (e)(3).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
JURY CHARGE

General Consideration

Defendant has burden of proving mental retardation beyond reasonable doubt.

Trial court erred in determining that a petitioner who claimed that the petitioner was guilty but mentally retarded was required to prove the petitioner's claim of retardation by a preponderance of the evidence. Georgia's requirement in O.C.G.A. § 17-7-131 that retardation be proved beyond a reasonable doubt was constitutional. *Stripling v. State*, 289 Ga. 370, 711 S.E.2d 665 (2011).

Burden of proof determined by states. — Because *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) left it for the states to develop the standard of proof as to mental retardation, a federal habeas court could not find a Georgia Supreme Court decision — that O.C.G.A. § 17-7-131's reasonable doubt standard did not violate the Eighth Amendment — was an "unreasonable application" of "clearly established" federal law; thus, denial of habeas relief to petitioner death row inmate was proper. Georgia's process as to the mentally retarded and the death penalty, when evaluated as a whole, contained substantial procedural protections, as § 17-7-131(c)(3) allowed a defendant to raise the issue of mental retardation in the guilt phase of the defendant's criminal trial and permitted a jury to find a defendant guilty but mentally retarded, which had two significant advantages: the jury did not hear the criminal history that was allowed in the penalty phase, and the jury was not informed that a guilty but mentally retarded verdict would preclude the death penalty. *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011).

Death penalty.

Habeas court did not err by failing to address in a defendant's ineffective assistance claim whether potential mental health evidence could have supported a

verdict of guilty but mentally ill because O.C.G.A. § 17-7-131 did not preclude a death sentence if defendant would have obtained a verdict of guilty but mentally ill. Therefore, the habeas court did not err in failing to address the merits of the defendant's claim beyond addressing the role that potential mental health evidence might have played as mitigating evidence in the sentencing phase. *Schofield v. Cook*, 284 Ga. 240, 663 S.E.2d 221 (2008).

Presumption of continued need for inpatient involuntary treatment overcome. — Trial court erred in denying a recommendation filed by the Department of Behavioral Health with Developmental Disabilities that a patient be moved to a group home for outpatient involuntary treatment because the preponderance of the evidence supported a finding that the patient overcame the presumption under O.C.G.A. § 24-4-21 of a continued need for inpatient involuntary treatment, and there was no evidence to support the trial court's finding that under O.C.G.A. § 37-3-1(9.1), the patient posed a substantial risk of imminent harm to the patient or others or was so unable to care for the patient's own physical health and safety as to create an imminently life-endangering crisis; the group home would have only two other suitable patient occupants, both of whom would be under the supervision of live-in supervisors and would have little opportunity to pressure the patient into misconduct, the patient would not be permitted to leave the group home unsupervised, the manager of the group home testified that as soon as patients were admitted into the group home and evaluated, an individualized service plan was created, and there was no statutory requirement that a plan exist prior to release. *Nelor v. State*, 309 Ga. App. 165, 709 S.E.2d 904 (2011).

Plea of guilty but mentally retarded. — Trial court could accept a plea of guilty but mentally retarded if the state agreed and the trial court found a factual

basis for the plea. If the state objected, the trial court was required to reject the plea and hold a trial. *Stripling v. State*, 289 Ga. 370, 711 S.E.2d 665 (2011).

Denial of release held proper.

Patient, who was involuntarily committed to a hospital after the patient was found not guilty by reason of insanity of several crimes, was not entitled to an unconditional release from the hospital because the patient, who had to take medication, had engaged in dangerous or threatening acts towards others, the patient's personality disorders and the patient's schizo-affective disorder qualified as mental illnesses under O.C.G.A. § 37-1-1(12), and the patient's schizo-affective disorder also would have made the defendant an imminent threat of harm to others if the defendant were unconditionally released. *Dupree v. Schwarzkophf*, No. S11A0290, 2011 Ga. LEXIS 508 (June 27, 2011).

Trial court did not err in denying the defendant's petition for release from inpatient involuntary treatment under O.C.G.A. § 17-7-131(f) because the defendant continued to meet the statutory inpatient involuntary treatment criteria under O.C.G.A. § 37-3-1(9.1), and the defendant failed to rebut the presumption of continuing insanity and that inpatient involuntary treatment was still required; the defendant's experts testified that the defendant had physical altercations with patients and had relapsed and experienced an auditory hallucination after the trial court denied the defendant's prior request for release, which led to an increase in medications. *Newman v. State*, 314 Ga. App. 99, 722 S.E.2d 911 (2012).

Defendant failed to prove sanity.

Defendant failed to carry the defendant's burden of showing by a preponderance of the evidence that the defendant was sane after the defendant was found not guilty by reason of insanity on two stalking charges and was ordered into a civil commitment to a mental health facility; the verdict of not guilty by reason of insanity established both that the defendant committed the criminal offense and that the defendant did so because of a mental illness, and once the defendant was ruled insane, a presumption existed

under O.C.G.A. § 24-4-21 that the insanity existed thereafter, and the defendant put on very little evidence to the contrary. *Bonney v. State*, 295 Ga. App. 706, 673 S.E.2d 102 (2009).

Procedure for opening statements and closing arguments. — Trial of a habeas corpus petitioner's claim of mental retardation should be regarded as a completion of the guilt/innocence phase of the petitioner's original trial and, therefore, the state was entitled under Ga. Unif. Super. Ct. R. 10.2 to make an opening statement before the petitioner. Under O.C.G.A. § 17-8-71, the state was entitled to make an initial closing argument, the petitioner could then make the petitioner's closing argument, and the state was entitled to make a final closing argument. *Stripling v. State*, 289 Ga. 370, 711 S.E.2d 665 (2011).

Ineffective assistance of counsel for failing to plead guilty but mentally retarded not found. — With regard to a defendant's convictions for kidnapping, aggravated sodomy, and aggravated sexual battery, the defendant was not rendered ineffective assistance of counsel as a result of trial counsel's decision not to file a plea of guilty but mentally retarded and, instead, attack the credibility of the victim, as trial counsel's decision as to which theory of defense to pursue was a matter of trial strategy and tactics that was not unreasonable and thus did not constitute ineffective assistance. *Hampton v. State*, 294 Ga. App. 857, 670 S.E.2d 502 (2008).

Cited in *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008); *Hall v. Lance*, 286 Ga. 365, 687 S.E.2d 809 (2010).

Jury Charge

If there is no evidence to support a charge on insanity, etc.

Because the defendant failed to present any evidence from which a jury could conclude that the defendant did not know right from wrong when the defendant committed the criminal acts, the trial court did not err in declining to charge the jury pursuant to O.C.G.A. § 17-7-131(b)(1)(C) that the defendant could be found not guilty by reason of insanity under O.C.G.A. § 16-3-2; the defendant introduced no evidence of insanity, only lay

witness testimony about generalized A11A1734, 2012 Ga. App. LEXIS 272 problems. McBride v. State, No. (Mar. 12, 2012).

RESEARCH REFERENCES

ALR. — Extended commitment of one of acquittal of crime on ground of insanity, committed to institution as consequence 52 ALR6th 567.

PART 3

CHANGE OF VENUE

Law reviews. — For article, “Rule of Law Doesn’t Just Happen,” see 16 (No. 2) Ga. St. B.J. 24 (2010).

17-7-150. Procedures for change of venue; transfer of case; appeal from denial of change of venue.

Law reviews. — For article, “Rule of Law Doesn’t Just Happen,” see 16 (No. 2) Ga. St. B.J. 24 (2010).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
JUROR IMPARTIALITY

General Consideration

Change of venue is in court’s discretion.

Trial court did not abuse the court’s discretion in moving Bibb County jurors to Chatham County and in sequestering the jurors because local media coverage necessitated the jury’s sequestration; the defendant had no legal right to demand that the jurors be instructed that the jurors had been brought to Chatham County over the defendant’s objection. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Ineffective assistance of counsel not established. — Defendant’s claim that counsel was ineffective with regard to a motion for a change of venue failed; defendant had not shown that jury was tainted and had not shown how live evidence or a citizen survey could have accomplished any more than the introduction in evidence of existing pretrial

publicity or voir dire. *Harvey v. State*, 284 Ga. 8, 660 S.E.2d 528 (2008).

No evidence supporting change in venue.

Trial court properly denied murder defendant’s motion for change of venue under O.C.G.A. § 17-7-150(a) based on a 1983 manslaughter conviction; trial counsel acknowledged that no potential juror indicated that he or she was aware of the 1983 homicide. *Harvey v. State*, 284 Ga. 8, 660 S.E.2d 528 (2008).

A trial court did not abuse the court’s discretion in refusing to transfer venue of a defendant’s trial on a felony murder charge because the defendant failed to show that the setting of the trial was inherently prejudicial due to inflammatory or incorrect pretrial publicity, and the defendant failed to demonstrate that the defendant could not receive a fair trial due to the prejudice of individual jurors. *Edmond v. State*, 283 Ga. 507, 661 S.E.2d 520 (2008).

Juror Impartiality**Prejudice resulting from news publicity.**

The trial court did not abuse its discretion in denying a defendant's motion for change of venue based upon pretrial pub-

licity because the defendant failed to show that the pretrial publicity created an inherently prejudicial atmosphere or affected the jurors' ability to be fair and impartial. *Holmes v. State*, 284 Ga. 330, 667 S.E.2d 71 (2008).

ARTICLE 7**DEMAND FOR TRIAL; ANNOUNCEMENT OF READINESS FOR TRIAL****17-7-170. Demand for speedy trial; service; discharge and acquittal for lack of prosecution; expiration; reversal on direct appeal; mistrial and retrial; special pleas of incompetency.**

(a) Any defendant against whom a true bill of indictment or an accusation is filed with the clerk for an offense not affecting the defendant's life may enter a demand for speedy trial at the court term at which the indictment or accusation is filed or at the next succeeding regular court term thereafter; or, by special permission of the court, the defendant may at any subsequent court term thereafter demand a speedy trial. In either case, the demand for speedy trial shall be filed with the clerk of court and served upon the prosecutor and upon the judge to whom the case is assigned or, if the case is not assigned, upon the chief judge of the court in which the case is pending. A demand for speedy trial filed pursuant to this Code section shall be filed as a separate, distinct, and individual document and shall not be a part of any other pleading or document. Such demand shall clearly be titled "Demand for Speedy Trial"; reference this Code section within the pleading; and identify the indictment number or accusation number for which such demand is being made. The demand for speedy trial shall be binding only in the court in which the demand for speedy trial is filed, except where the case is transferred from one court to another without a request from the defendant.

(b) If the defendant is not tried when the demand for speedy trial is made or at the next succeeding regular court term thereafter, provided that at both court terms there were juries impaneled and qualified to try the defendant, the defendant shall be absolutely discharged and acquitted of the offense charged in the indictment or accusation. For purposes of computing the term at which a misdemeanor must be tried under this Code section, there shall be excluded any civil term of court in a county in which civil and criminal terms of court are designated; and for purposes of this Code section it shall be as if such civil term was not held.

(c) Any demand for speedy trial filed pursuant to this Code section shall expire at the conclusion of the trial or upon the defendant entering a plea of guilty or nolo contendere.

(d) If a case in which a demand for speedy trial has been filed, as provided in this Code section, is reversed on direct appeal, a new demand for speedy trial shall be filed within the term of court in which the remittitur from the appellate court is received by the clerk of court or at the next succeeding regular court term thereafter.

(e) If the case in which a demand for speedy trial has been filed as provided in this Code section results in a mistrial, the case shall be tried at the next succeeding regular term of court.

(f) If a defendant files a special plea of incompetency to stand trial pursuant to Code Section 17-7-130 or if the court, pursuant to Code Section 17-7-129, conducts a trial on the competency of the defendant, the period of time during which such matter is pending shall not be included in the computation of determining whether a demand for speedy trial has been satisfied. (Ga. L. 1859, p. 60, § 1; Code 1863, § 4534; Code 1868, § 4554; Code 1873, § 4648; Code 1882, § 4648; Penal Code 1895, § 958; Penal Code 1910, § 983; Code 1933, § 27-1901; Ga. L. 1985, p. 637, § 5; Ga. L. 1987, p. 841, § 1; Ga. L. 2003, p. 154, § 3; Ga. L. 2006, p. 893, § 1/HB 1421; Ga. L. 2011, p. 372, § 3/HB 421.)

The 2011 amendment, effective July 1, 2011, added subsection (f).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TIMING

DEMAND

WAIVER

IMPACT OF MOTIONS FOR MISTRIALS

DISCHARGE AND ACQUITTAL

General Consideration

Demand not required when constitutional issue. — Although the defendant did not file a statutory demand for speedy trial pursuant to O.C.G.A. § 17-7-170, the defendant was not required to do so in order to prevail on a constitutional speedy trial claim. *Miller v. State*, 313 Ga. App. 552, 722 S.E.2d 152 (2012).

Construction with Ga. Unif. Sup. Ct. R. 32.1.

Trial court did not wholly fail to comply with the seven-day notice requirement of Ga. Unif. Super. Ct. R. 32.1 because the trial court gave at least five days notice, and it was apparent by the defendant's demand for trial that the defendant had shortened the time for trial, which constituted a factor for the trial court to consider when setting the trial date; the trial

court was attempting to comply with the demand for trial, and the only way to do so was by deviating from the notice requirement. *Higuera-Hernandez v. State*, 289 Ga. 553, 714 S.E.2d 236 (2011).

Cited in *Ruffin v. State*, 284 Ga. 52, 663 S.E.2d 189 (2008); *Grizzard v. State*, 301 Ga. App. 613, 688 S.E.2d 402 (2009); *Teasley v. State*, 307 Ga. App. 153, 704 S.E.2d 248 (2010); *Weems v. State*, 310 Ga. App. 590, 714 S.E.2d 119 (2011); *Walker v. State*, 290 Ga. 696, 723 S.E.2d 894 (2012).

Timing

Premature demand.

Trial court properly denied a defendant's motion for discharge and acquittal on statutory speedy trial grounds pursuant to O.C.G.A. § 17-7-170(a) because the defendant's speedy trial demand was premature and a nullity since the "complaint" was filed after the defendant's arrest, was not an accusation pursuant to O.C.G.A. §§ 17-7-70 and 17-7-70.1, and the prosecution did not proceed on the "complaint." *Campbell v. State*, 294 Ga. App. 166, 669 S.E.2d 190 (2008).

Thirty-four month delay in requesting speedy trial. — Although over 34 months elapsed from the date of a defendant's arrest to the date of the denial of a motion to dismiss the indictment based on an alleged Sixth Amendment speedy trial violation, the motion was properly denied. The defendant never filed a statutory demand for speedy trial under O.C.G.A. § 17-7-170 and only raised the constitutional right to a speedy trial in a motion filed 30 months after indictment; the state never sought a continuance; the delay was solely due to the congested docket; and the defendant had been free on bail and did not show that the defendant's ability to present a defense would be impaired. *West v. State*, 295 Ga. App. 15, 670 S.E.2d 833 (2008).

Demand

Filing demand after indictment not prerequisite for asserting violation of constitutional speedy trial right. — Trial court erred in denying the defendant's motion to dismiss an indictment on the ground that the state violated the

defendant's right to a speedy trial under the Sixth Amendment because the trial court failed to consider the facts showing that the defendant was out on bond and without counsel during the 42-month period between the defendant's arrest and indictment; the defendant was not entitled to file a statutory demand for a speedy trial pursuant to O.C.G.A. § 17-7-170 during the 42 months following the arrest but prior to the indictment, and the filing of a demand after the indictment was not a prerequisite for asserting a violation of the constitutional right to a speedy trial. *Goffaux v. State*, 313 Ga. App. 428, 721 S.E.2d 635 (2011).

Waiver

Defendant's attorney did not waive demand by agreeing to continuance.

— Although a defendant's attorney agreed to a continuance in early December 2004, there was no evidence that the attorney agreed to continue the case past that term of court, which, pursuant to O.C.G.A. § 15-5-3, did not end until February 2005, and in which the case could have been tried and was required to be tried following defendant's speedy trial demand under O.C.G.A. § 17-7-170 in the prior court term. *Thornton v. State*, 301 Ga. App. 784, 689 S.E.2d 361 (2009).

Waiver by motion to quash. — Defendant's O.C.G.A. § 17-7-170 speedy trial claim was properly denied because the defendant's motions to quash the indictments were affirmative actions which forced the state to reindict, defendant failed to support, with evidence the assertion that there were jurors ready to hear trials toward the end of the term of court, and, finally, after the third indictment, the defendant requested to be tried within the current or following term, which included the August term during which the defendant filed the motion that led to the appeal; defendant's latest request for a speedy trial afforded no ground for relief at that time. *Tyner v. State*, 298 Ga. App. 42, 679 S.E.2d 82 (2009).

Waiver of demand for speedy trial would result from continuance granted on motion of accused, etc.

Defendant waived the right to a speedy trial under O.C.G.A. § 17-7-170 as the

defendant repeatedly acknowledged that the defendant's motion for a continuance would constitute a waiver of the defendant's right to an automatic discharge and acquittal. Furthermore, there was no evidence that the state intended to manipulate the trial calendar by re-indicting the defendant; although the new indictment required proof of a new element, the defendant was given two weeks' notice of the state's intent to present the new indictment to the grand jury, and it was the defendant who requested a continuance on the last date in which it was possible to try the case in accordance with the defendant's speedy trial demand. *Trimm v. State*, 297 Ga. App. 861, 678 S.E.2d 567 (2009).

Defense counsel's actions waived demand.

Trial court did not err in denying the defendant's pro se demand for a speedy trial on the ground that the defendant was represented by counsel when the defendant filed the motion because the defendant was represented by a public defender when the defendant filed the pro se demand; at the bond hearing, the defendant's attorney stated that the attorney spoke with the defendant and that they were not adopting the pro se speedy trial demand filed previously, which operated as a waiver of the defendant's right to an automatic discharge under O.C.G.A. § 17-7-170, and once the case was tried, the defendant's demand for a speedy trial expired. *Works v. State*, 301 Ga. App. 108, 686 S.E.2d 863 (2009), cert. denied, No. S10C0458, 2010 Ga. LEXIS 251 (Ga. 2010).

State failed to establish waiver. — Trial court erred in denying the defendant's motion for discharge and acquittal on statutory speedy trial grounds because the State failed to establish a waiver based upon the fact that the defendant's counsel had filed several notice of conflict letters pursuant to Ga. Unif. Super. Ct. R. 17.1; the conflict letters were filed after the two terms of court had expired and were not relevant to the waiver issue. *Gifford v. State*, 301 Ga. App. 50, 686 S.E.2d 831 (2009).

Impact of Motions for Mistrials

Trial court abused the court's discretion in declaring a mistrial and

abridging defendant's constitutional right to be tried by the originally impaneled jury without first considering less drastic alternatives when the assigned courtroom was unavailable at the appointed time. The procedure the court used was flawed, not the result. A trial court is not categorically required to grant a continuance under similar circumstances; merely the court should consider a continuance as an alternative to declaring a mistrial. Since the trial court told defense counsel that if the defendant did not plead guilty, the court would declare a mistrial, the court took little or no heed to the defendant's constitutional rights thereby constituting an abuse of discretion. *McGee v. State*, 287 Ga. App. 839, 652 S.E.2d 822 (2007).

Discharge and Acquittal

Defendant's motion for discharge and acquittal was improperly denied.

— Defendant was denied the constitutional right to a speedy trial and to due process based on the state's intentional act of trading discovery responses for a speedy trial right, and the resulting prejudice from the disappearance of a material witness. The trial court therefore abused the court's discretion in denying the defendant's motion for discharge and acquittal. *Ditman v. State*, 301 Ga. App. 187, 687 S.E.2d 155 (2009), cert. denied, No. S10C0539, 2010 Ga. LEXIS 243 (Ga. 2010).

Because a defendant did not waive the defendant's statutory right to a speedy trial on the accusations charging the defendant with fleeing and attempting to elude and reckless driving, and because the state failed to try the defendant during the term in which the demand was filed or the next succeeding regular term of court, pursuant to O.C.G.A. § 17-7-170(b), the defendant was entitled to an acquittal on those charges. *Goddard v. State*, 310 Ga. App. 2, 712 S.E.2d 528 (2011).

Trial court erred in denying the defendant's motion for discharge and acquittal on statutory speedy trial grounds because the State's contention that the defendant had failed to comply with O.C.G.A. § 17-7-170 since he had not been physically present in court when the

case was called for trial was misplaced; the reason the defendant was not physically present in court was that he remained in state custody and had not been

returned from prison to the courtroom. *Gifford v. State*, 301 Ga. App. 50, 686 S.E.2d 831 (2009).

RESEARCH REFERENCES

ALR. — Construction and application of Speedy Trial Act, 18 USCS §§ 3161 to 3174 — United States Supreme Court cases. 46 ALR Fed. 2d 129.

17-7-171. Time for demand for speedy trial in capital cases; discharge and acquittal where no trial held before end of two court terms of demand; counting of terms in cases in which death penalty is sought; special pleas of incompetency.

(a) Any person accused of a capital offense may enter a demand for speedy trial at the term of court at which the indictment is found or at the next succeeding regular term thereafter; or, by special permission of the court, the defendant may at any subsequent term thereafter demand a speedy trial. The demand for speedy trial shall be filed with the clerk of court and served upon the prosecutor and upon the judge to whom the case is assigned or, if the case is not assigned, upon the chief judge of the court in which the case is pending. A demand for trial filed pursuant to this Code section shall be filed as a separate, distinct, and individual document and shall not be a part of any other pleading or document. Such demand shall clearly be titled "Demand for Speedy Trial"; reference this Code section within the pleading; and identify the indictment number or accusation number for which such demand is being made. The demand for speedy trial shall be binding only in the court in which such demand is filed, except where the case is transferred from one court to another without a request from the defendant.

(b) If more than two regular terms of court are convened and adjourned after the term at which the demand for speedy trial is filed and the defendant is not given a trial, then the defendant shall be absolutely discharged and acquitted of the offense charged in the indictment, provided that at both terms there were juries impaneled and qualified to try the defendant and provided, further, that the defendant was present in court announcing ready for trial and requesting a trial on the indictment.

(c) In cases involving a capital offense for which the death penalty is sought, if a demand for speedy trial is entered, the counting of terms under subsection (b) of this Code section shall not begin until the convening of the first term following the completion of pretrial review proceedings in the Supreme Court under Code Section 17-10-35.1.

(d) If a defendant files a special plea of incompetency to stand trial pursuant to Code Section 17-7-130 or if the court, pursuant to Code

Section 17-7-129, conducts a trial on the competency of the defendant, the period of time during which such matter is pending shall not be included in the computation of determining whether a demand for speedy trial has been satisfied. (Ga. L. 1952, p. 299, §§ 1, 2; Ga. L. 1983, p. 452, § 3; Ga. L. 1988, p. 1437, § 3; Ga. L. 1990, p. 8, § 17; Ga. L. 2006, p. 893, § 2/HB 1421; Ga. L. 2011, p. 372, § 4/HB 421.)

The 2011 amendment, effective July 1, 2011, added subsection (d).

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Nine month delay acceptable. — Nine-month delay between a defendant's indictment for murder and the defendant's filing of a motion to dismiss the indictment on constitutional grounds was not a speedy trial violation under the Sixth Amendment as the defendant filed no demand for a speedy trial under O.C.G.A. § 17-7-171; did not raise the speedy trial issue for nine months; was imprisoned on other charges during those nine months; and showed no prejudice from the delay. *Jones v. State*, 284 Ga. 320, 667 S.E.2d 49 (2008).

Twelve month delay acceptable. — Trial court did not err when the court denied the defendant's motion to dismiss based on a purported violation of defendant's constitutional right to a speedy trial because the circumstances of the case warranted a finding that the twelve-month, ten-day delay between the defendant's indictment and the filing of defendant's motion to dismiss was not presumptively prejudicial. The defendant was serving a sentence on an unrelated charge in Mississippi when the indictment was returned, a requisition warrant had to be obtained from the Mississippi governor, which process was initiated within a month of the defendant's indictment and took three months before the warrant was issued, and the defendant was brought to Georgia two months after the warrant issued and was arraigned

approximately two months later. *Rogers v. State*, 286 Ga. 387, 688 S.E.2d 344 (2010).

54 month delay. — Trial court did not abuse the court's discretion in denying a defendant's motion to dismiss on the basis that the state violated the defendant's right to a speedy trial pursuant to the Sixth Amendment to the Constitution of the United States and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) because although the 54-month delay between the defendant's arrest and the filing of the defendant's motion was presumptively prejudicial, and the state offered no explanation for the delay, the defendant did not file a request for speedy trial pursuant to O.C.G.A. § 17-7-171, the defendant did not assert the defendant's constitutional right to a speedy trial for the 54 months between the defendant's arrest and the filing of the defendant's motion to dismiss, and the trial court specifically found that the defendant failed to establish prejudice; the defendant's late assertion of the defendant's constitutional right to a speedy trial weighed heavily against the defendant as did the defendant's failure to show prejudice in light of such delay. *Falagian v. State*, 300 Ga. App. 187, 684 S.E.2d 340 (2009).

Five year delay acceptable.

Despite the state's five-year delay in bringing defendant's child molestation case to trial, defendant's motion to dismiss based on the defendant's speedy trial right was denied because the defendant waited

more than five years to assert defendant's statutory right under O.C.G.A. § 17-7-171, and the defendant failed to show any prejudice resulting from the delay. *Arbegast v. State*, 301 Ga. App. 462, 688 S.E.2d 1 (2009), cert. denied, No. S10C0630, 2010 Ga. LEXIS 348 (Ga. 2010).

Speedy trial rights not violated. —

Although the delay of eight years and two months between the defendant's arrest and the defendant's motion to dismiss the indictment was uncommonly long and presumptively prejudicial, the trial court did not abuse the court's discretion in denying the defendant's motion to dismiss the indictment because: (1) the case was dead-docketed for five years when the state could not locate the victim; (2) nothing in the record showed that the state deliberately attempted to delay the trial to hamper the defense; and (3) fourteen months of the delay could be attributed to the defendant's failure to appear for several court dates; the defendant did not show actual prejudice to the defendant's defense because the police officers who arrested the defendant were available, and every person who was an eyewitness to or participant in the incident for which the defendant was arrested was available to testify. *Gray v. State*, 303 Ga. App. 97, 692 S.E.2d 716 (2010).

Defendant was not entitled to be discharged and acquitted until the close of the third term of court after the term in which the defendant filed the defendant's demand for a speedy trial because that was when more than two regular terms of court would have convened and adjourned after the term at which the demand for speedy trial was filed. Because the State of Georgia filed the state's notice of intent to seek the death penalty during the third term, which was before the defendant was entitled to be discharged and acquitted, that notice reset the statutory speedy trial clock, pursuant to O.C.G.A. § 17-7-171(c), and the defendant's motion was premature. *Walker v. State*, 290 Ga. 696, 723 S.E.2d 894 (2012).

Acts of defendant amount to waiver of right.

By acquiescing in the trial court's action of striking the defendant's first speedy-trial demand under O.C.G.A. § 17-7-171, in response to the defendant's counsel's illness at the time set for trial, the defendant abandoned any arguments with regard to the speedy trial, and the defendant's later failure to file an out-of-time demand after gaining permission to do so constituted a waiver. *Tolbert v. State*, 313 Ga. App. 46, 720 S.E.2d 244 (2011).

17-7-172. Requirement of announcement by state of readiness for trial prior to announcement by defendant; speedy trial.

JUDICIAL DECISIONS

Cited in *Ruffin v. State*, 284 Ga. 52, 663 S.E.2d 189 (2008).

ARTICLE 8

PROCEDURE FOR SECURING ATTENDANCE OF WITNESSES AT
GRAND JURY OR TRIAL PROCEEDINGS

17-7-191. Subpoena process for witnesses of defendant; when subpoenas may be extended to witnesses outside of county.

JUDICIAL DECISIONS

Authority to determine materiality of testimony of subpoenaed witnesses.

Court of appeals erred when the court concluded that a request under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, O.C.G.A. § 24-10-90 et seq., that an out-of-state corporation be required to produce purportedly material evidence in the corporation’s possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. *Yearly v. State*, 289 Ga. 394, 711 S.E.2d 694 (2011).

Court of appeals erred in ruling that the trial court did not abuse the court’s discre-

tion in denying the defendant’s motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-10-90 et seq., to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness is “necessary and material” is one of the determinations that must be made under the Act, O.C.G.A. § 24-10-92(b), by the judge in the county where the out-of-state witness is located, and the Georgia trial court evaluates the request under the Act, O.C.G.A. § 24-10-94, and must determine only whether the out-of-state witness is a “material witness” in the Georgia criminal prosecution and whether the court should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. *Davenport v. State*, 289 Ga. 399, 711 S.E.2d 699 (2011).

CHAPTER 8

TRIAL

**Article 2
Continuances**

Sec.
17-8-30. Grounds for granting of continuances — Party or party’s

counsel in attendance at meeting of Board of Human Services or Board of Behavioral Health and Developmental Disabilities.

ARTICLE 1

GENERAL PROVISIONS

17-8-3. Entry of nolle prosequi.

Law reviews. — For survey article on death penalty law, see 59 Mercer L. Rev. 123 (2007).

JUDICIAL DECISIONS

Nolle prosequi on two counts after submission to jury required new trial. — Trial court erred in allowing the state to nolle prosequi the two methamphetamine possession charges over the defendant's objection and proceed only on

a trafficking charge because the case had been submitted to the jury within the meaning of O.C.G.A. § 17-8-3. Also, this procedure essentially allowed the state to amend the indictment. *Truelove v. State*, 302 Ga. App. 418, 691 S.E.2d 549 (2010).

17-8-4. Procedure for trial of jointly indicted defendants; right of defendants to testify for or against one another; order of separate trials; acquittal or conviction where offense requires joint action or concurrence; number of strikes allowed defendants.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SEPARATE TRIALS

PREJUDICE

APPLICATION

JUROR STRIKES IN JOINT TRIALS

General Consideration

Discretion of court to join or sever.

Whether to grant a motion to sever the trial of some of the defendants is within the discretion of the trial court and the appellants were required to do more than raise the possibility that a separate trial would have given them a better chance of obtaining an acquittal. The test is whether the number of defendants will create confusion during the trial; whether the strength of the evidence against one defendant will engulf the others with a "spillover" effect; and whether the defendants' claims are antagonistic to each other's rights. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Separate Trials

Showing of harm is necessary before the court must sever.

In an armed robbery prosecution, as the evidence and law against the defendant and the codefendant was nearly identical and all of the evidence admissible against one was admissible against the other, the fact that their defenses were antagonistic was not alone sufficient to warrant severing their trials under O.C.G.A. § 17-8-4 absent a showing of harm. *Bailey v. State*, 295 Ga. App. 480, 672 S.E.2d 450 (2009).

Denial of severance proper. — Trial court did not err in denying a codefendant's request for severance because a joint trial with the defendant did not present a significant likelihood of confusion of

the evidence and law or the possibility that evidence introduced against the defendant could be improperly considered against the codefendant; the law applicable to the defendant and the codefendant was substantially the same, and the evidence at trial showed that they acted together in killing the victim. *Krause v. State*, 286 Ga. 745, 691 S.E.2d 211 (2010).

Trial court did not abuse the court's discretion by denying the defendant's motion for severance because the defendant did not show any prejudice that could have been avoided by severing the trial; a codefendant said nothing to the police that contradicted witnesses regarding threats the witnesses heard the defendant make. *Allen v. State*, 288 Ga. 263, 702 S.E.2d 869 (2010).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because there was no danger of confusion when only two defendants were on trial in connection with the same occurrence, and there was no evidence admissible against the defendant that was not admissible against the codefendant; the fact that the codefendant elicited a witness's testimony concerning a co-conspirator's out-of-court declarations as a co-conspirator did not show prejudice, and the witness's testimony was admissible under O.C.G.A. § 24-3-5. *White v. State*, 308 Ga. App. 38, 706 S.E.2d 570 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the defendant's trial from that of an accomplice because the defendant did not demonstrate any clear prejudice and denial of due process that could have been avoided by severing the trials; the testimony of the accomplice implicating the defendant would be admissible in a separate trial, as would evidence of the defendant's attempted flight and, under certain circumstances, statements the defendant made while cooperating with the state. *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Trial court did not err in denying the defendant's motion to sever the trial from that of the codefendant because the code-

defendant's testimony implicating the defendant would have been admissible in a separate trial; even if the defendant suffered some prejudicial effect from the admission of evidence of the codefendant's prior conviction, it did not amount to the denial of due process necessary to constitute an abuse of discretion that would make the denial of severance reversible error. *Smith v. State*, 290 Ga. 428, 721 S.E.2d 892 (2012).

Prejudice

Defendant must clearly show prejudice and denial of due process.

Because the defendant has made a clear showing of prejudice and consequent denial of due process based on the fact that the jury found the defendant guilty of a co-defendant's crimes, for which the defendant was not even on trial, the trial court abused the court's discretion in overruling the defendant's motion to sever. *Brooks v. State*, 311 Ga. App. 857, 717 S.E.2d 490 (2011).

Prejudice not shown.

Trial court did not err in denying a codefendant's request for severance because the codefendant did not show specific prejudice from the presentation of antagonistic defenses; although the defendant and the codefendant raised antagonistic defenses, in the sense that each of them pointed to the other as the shooter and the leader in killing the victim and disposing of the body, that alone was insufficient to require severance. *Krause v. State*, 286 Ga. 745, 691 S.E.2d 211 (2010).

Although the defendant complained that the defendant was not permitted to question a codefendant about the codefendant's possible past involvement in drug activity, absent a showing of prejudice to defendant, the trial court did not err in denying the defendant's motion to sever. *Williams v. State*, 308 Ga. App. 464, 708 S.E.2d 32 (2011).

Application

Motion to sever in murder cases.

Denial of motions to sever murder trials under O.C.G.A. § 17-8-4(a) was proper because there was no showing of prejudice from the joint trial of the first defendant and the second defendant, the first defen-

dant's statement to police about a prior altercation with the victim did not, standing alone, inculcate the second defendant in the charged crimes, there was no reasonable probability that the statement contributed to the guilty verdicts, and there was no danger of confusion in this case because there were only two defendants allegedly acting in concert and the evidence was not such that it confused the jury as to their individual participation in the crimes. *Daniel v. State*, 285 Ga. 406, 677 S.E.2d 120 (2009).

Motion to sever in kidnapping cases. — In a kidnapping prosecution, the defendant was not entitled to sever the codefendant from the trial. Since the codefendant testified and was available for cross-examination, the codefendant's confession was admissible against both defendants; further, the codefendant's defense was not antagonistic to the defendant's as the codefendant simply denied making alleged statements to police or participating in the victim's death. *Hunsberger v. State*, 299 Ga. App. 593, 683 S.E.2d 150 (2009).

Evidence that jury was able to consider each defendants case separately.

Trial court did not abuse the court's discretion by denying a defendant's motion to sever the defendant's trial from the codefendant's trial, with regard to charges of armed robbery and theft by receiving stolen property involving stopping in front of a vehicle and taking the victim's purse by gunpoint as the defendant failed to show that the evidence against the codefendant was stronger since the victim identified the defendant as the driver of the vehicle that stopped in front of the victim's car. Further, the fact that the defendant and the codefendant shared the same last name (as siblings) did not confuse the jury as the case only involved the two defendants, the trial court instructed the jury to consider each of the defendants separately, and the fact that the jury acquitted the defendant of the theft by receiving stolen property crime while the codefendant, who was the owner of the vehicle, was convicted of that charge indicated that the jury had the ability to decide each charge and each of the defen-

dants separately. *Rabie v. State*, 294 Ga. App. 187, 668 S.E.2d 833 (2008).

Trial court did not err in denying the defendant's motion to sever because the defendant cited only the "volatile relationships" and "irreconcilable differences" among the various defense attorneys, the prosecutor, and the lead detective; there was no indication that the jury confused the evidence or law. All three defendants were charged with identical crimes, and the jury, in reaching different verdicts as to each codefendant, proved itself amply capable of distinguishing the evidence relevant to each. *Thorpe v. State*, 285 Ga. 604, 678 S.E.2d 913 (2009).

No abuse for failure to sever.

Because a codefendant could have testified against the defendant in a separate trial if the defendant's motion to sever had been granted, the defendant failed to show harm from the denial of the motion to sever. Accordingly, the trial court did not abuse the court's discretion in denying the defendant's motion to sever due to antagonistic defenses. *Hendrix v. State*, 284 Ga. 420, 667 S.E.2d 597 (2008).

Trial court did not err in failing to grant a defendant's motion for severance of defendants under O.C.G.A. § 17-8-4(a); because a witness did not exculpate the defendant, but implicated the defendant as a party, the defendant was not prejudiced by the codefendants' attempts to discredit the witness. As for a second defendant, failure to grant a severance was harmless in light of the overwhelming evidence of guilt. *Metz v. State*, 284 Ga. 614, 669 S.E.2d 121 (2008), overruled on other grounds, *State v. Kelly*, 290 Ga. 29, 718 S.E.2d 232 (2011).

With regard to several defendants challenging the trial court's denial of the defendants' motions to sever the cases from the other defendants, the defendants failed to show that the trial court abused its discretion by denying the motions as the defendant did not make a clear showing of prejudice sufficient to establish a denial of due process since each defendant was charged with a Georgia Racketeering Influenced and Corrupt Organization Act (RICO) violation, thus, all of the evidence was admissible against all the defendants, and would have been admissible

even if they had separate trials on the RICO violations. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Trial court did not err in denying the defendant's motion to sever under O.C.G.A. § 17-8-4(a). The danger of confusion from three defendants appeared minimal; there appeared to be no danger that the evidence against one would be considered against the others, especially as the three were charged with jointly participating in the same offenses and as the offenses were committed as part of the same crime scheme; and the defenses were not antagonistic when the motion was considered, although the defenses later became so when one defendant chose to testify against the others. *Lankford v. State*, 295 Ga. App. 590, 672 S.E.2d 534 (2009).

Trial court did not abuse the court's discretion by denying the defendant's motion to sever the defendant's trial from the codefendant's trial because the law applicable to each defendant was substantially the same, and the evidence at trial showed that the defendant and the codefendant acted together in killing the victim. Moreover, the defendant did not clearly show that a joint trial prejudiced the defendant's defense, resulting in a denial of due process. *Herbert v. State*, 288 Ga. 843, 708 S.E.2d 260 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the defendant's trial from that of the codefendants because the familial and personal interrelationships of the three defendants and one of the victims were not so confusing as to warrant separate trials; the relationships went to motive for the shootings and would have been admissible had the codefendants been tried separately. *Glass v. State*, 289 Ga. 706, 715 S.E.2d 85 (2011).

Failure to request severance not ineffective assistance.

With regard to a defendant's conviction for trafficking cocaine, the defendant was

not rendered ineffective assistance of counsel by defense counsel failing to request that the defendant's trial be severed from a codefendant's trial since, as testified to by defense counsel at the defendant's motion for a new trial, there were no legal grounds for a severance. Namely, it was completely permissible that the codefendant testified against the defendant; the codefendant's testimony would have been admissible against the defendant even if there would have been two trials, and the defendant made no showing otherwise; and the codefendant's testimony was consistent with the defendant's theory of defense, specifically, that both tried to place the blame for the presence of the drugs exclusively on another. *Mosley v. State*, 296 Ga. App. 746, 675 S.E.2d 607 (2009), cert. denied, No. S09C1188, 2009 Ga. LEXIS 322 (Ga. 2009).

Trial counsel's failure to renew a motion to sever did not constitute deficient performance because the strategic decision fell within the wide latitude of presumptively reasonable conduct engaged in by trial attorneys; counsel testified that counsel did not renew the motion to sever because counsel had impeached the codefendant on cross-examination and believed that the trial court would not grant severance at that stage of the proceedings. *Glass v. State*, 289 Ga. 706, 715 S.E.2d 85 (2011).

Juror Strikes in Joint Trials

No equal protection violation. — O.C.G.A. § 17-8-4(b), which allows defendants tried jointly 14 peremptory challenges (while O.C.G.A. § 15-12-165 allows a defendant tried alone nine such challenges), does not violate equal protection as there are valid reasons for discriminating between the peremptory challenges of single defendants and codefendants: the avoidance of undue delay and a needless burden on the public. *Dixon v. State*, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

RESEARCH REFERENCES

ALR. — Desire of accused to testify on just one of multiple charges as basis for severance of trials, 32 ALR6th 385.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution, 41 ALR6th 295.

Antagonistic defenses as ground for separate trials of codefendants in criminal case — federal marijuana offenses, 34 ALR Fed. 2d 509.

17-8-5. Recordation of testimony in felony cases; entering testimony on minutes of court where guilty verdict found; preparation of transcript where death sentence imposed; preparation of transcript where mistrial results in felony case.

JUDICIAL DECISIONS

Completion of record.

Supreme court could not review the defendant's claim that the trial court set pretrial bond in an excessive and unreasonable amount because the defendant failed to have the record completed pursuant to O.C.G.A. § 5-6-41; testimony at the hearing on the motion for new trial was not a sufficient substitute for a transcript, and without a transcript of the bond hearing or a statutorily authorized substitute, the supreme court had to assume that the trial court's judgment was correct. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Unrecorded voir dire.

Trial court did not abuse the court's discretion in denying the defendant's mo-

tion for a change of venue because although the court reporter transcribed the motion for change of venue and the trial court's ruling, the actual questions and answers of the prospective jurors were not reported, and defense counsel made no motion at that time to include the responses in the record or to have the responses reconstructed for the record; since voir dire was not transcribed, it was assumed that the jurors who were not excused for cause did not have such fixed opinions that the jurors could not be impartial judges of the defendant's guilt. *Walden v. State*, 289 Ga. 845, 717 S.E.2d 159 (2011).

ARTICLE 2

CONTINUANCES

17-8-20. Showing of due diligence required of applicants for continuances generally.

JUDICIAL DECISIONS

Continuance properly denied.

Because the record on appeal showed that defense counsel had more than a week before trial to review the state's discovery, had reviewed the material with the defendant, and had also had time before trial to hire an expert, the appeals court could not conclude that the grounds alleged in support of a continuance of the

trial was compelling. *Robbins v. State*, 290 Ga. App. 323, 659 S.E.2d 628 (2008).

Trial court did not err in denying a defendant's motion to continue a new trial hearing so that the defendant could develop evidence regarding trial counsel's failure to engage in reciprocal discovery. The court was authorized to conclude that the defendant, who knew before the hear-

ing that trial counsel had not engaged in discovery but failed to voice concerns until after trial counsel testified, had exercised little diligence in pursuing the discovery issue and that the ends of justice did not require a continuance. *Anufo v. State*, 293 Ga. App. 1, 666 S.E.2d 50 (2008).

Trial court did not abuse the court's discretion in denying the defendant's request for a continuance on the ground that an expert witness was not available, and the defendant needed to find another wit-

ness because the record did not demand a finding that the defendant exercised diligence under O.C.G.A. § 17-8-20 in light of the fact that trial counsel was appointed some months before the trial; the defendant made no showing as to the expert's identity, no proffer of the expected testimony, and no showing of how that testimony would benefit the defendant. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012).

17-8-22. Consideration of motion for continuance by court generally; allowance of counter-showing to motion.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

PRACTICE AND PROCEDURE

APPELLATE REVIEW

General Consideration

Cited in *Blackshear v. State*, 285 Ga. 619, 680 S.E.2d 850 (June 29, 2009); *Smith v. State*, 290 Ga. 428, 721 S.E.2d 892 (2012).

Application

Continuance for recently hired counsel. — Trial court did not abuse its discretion in denying a motion for a continuance made by recently hired co-counsel minutes before jury selection, particularly given that counsel was assisted at trial by an attorney who had been involved in the case for several months. *Burrowes v. State*, 296 Ga. App. 629, 675 S.E.2d 518 (2009).

Continuance to review witness' statements. — That the state had not produced copies of its witnesses' written statements to police, which defense counsel discovered shortly before voir dire, did not oblige the trial court to grant defendant a continuance, as (1) the state did not withhold the evidence, (2) the case was recessed so counsel could examine the statements, and (3) defendant did not show what defendant would have accomplished if defendant had been provided

more time. *Burrowes v. State*, 296 Ga. App. 629, 675 S.E.2d 518 (2009).

Continuance to obtain expert witness.

Trial court did not abuse the court's discretion in denying the defendant's request for a continuance on the ground that an expert witness was not available, and the defendant needed to find another witness because the record did not demand a finding that the defendant exercised diligence under O.C.G.A. § 17-8-20 in light of the fact that trial counsel was appointed some months before the trial; the defendant made no showing as to the expert's identity, no proffer of the expected testimony, and no showing of how that testimony would benefit the defendant. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012).

Continuance to review officer's personnel file not permitted. — With regard to a defendant's trial for obstruction of a police officer and other related crimes, the trial court did not abuse the court's discretion by denying the defendant's motion for a continuance to review the personnel file of the officer involved after defense counsel announced ready as, in response, the trial court reviewed the of-

ficer's personnel file in camera and determined that the file did not contain any evidence relevant to the defendant's defense. *Whatley v. State*, 296 Ga. App. 72, 673 S.E.2d 510 (2009).

Insufficient time for preparation of counsel.

As the charges against the defendant had been pending for more than two years before trial; defense counsel had early access to both the list of state's witnesses and the autopsy report when it was completed more than ten months prior to trial; and hospital and emergency medical technician reports not contained in the state's file were provided to defense counsel when they were requested, the defendant failed to demonstrate any harm from the denial of a motion for continuance to give counsel more time to examine those reports. *Carter v. State*, 285 Ga. 394, 677 S.E.2d 71 (2009).

Defendant showed no harm resulting from the trial court's denial of the defendant's motions for a continuance on the ground that the defendant had insufficient time to prepare for trial because the defendant did not identify any additional witnesses or evidence in mitigation that the defendant could have presented had the defendant been granted a continuance; the trial court authorized additional time and funds to enable defense counsel to obtain the assistance of a third attorney, at least three investigators, and a secretary and/or a paralegal devoted to the defendant's case. *Loyd v. State*, 288 Ga. 481, 705 S.E.2d 616 (2011), cert. dismissed, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Trial court did not abuse the court's discretion in denying the defendant's motion for a continuance because the record did not indicate that the state played a role in delaying the production of medical records; the defendant's expert witness testified that the expert had reviewed all of the medical records that the expert had been given, including those produced in preparing for the trial, and while the defendant asserted that a continuance would have afforded trial counsel more

time to work with the expert witness to thoroughly prepare cross-examinations of the state's witnesses, the defendant made no showing that trial counsel's cross-examinations were somehow inadequate, nor did the defendant point to any additional challenges or defenses that could have been presented on the defendant's behalf. *Eskew v. State*, 309 Ga. App. 44, 709 S.E.2d 893 (2011).

Practice and Procedure

Motion for continuance denied.

Trial court did not abuse the court's discretion when the court denied the defendant's motion for a continuance because the state did not call the witness whose identity was not made known to trial counsel until the day before trial, and the defendant was given the opportunity to interview the witness before the trial commenced. *Glass v. State*, 289 Ga. 706, 715 S.E.2d 85 (2011).

Appellate Review

Denial of motion upheld.

With regard to a defendant's conviction for trafficking in cocaine, the trial court did not abuse the court's discretion in denying the defendant's motion for a continuance, or in the alternative, for a mistrial, which the defendant requested as a remedy for the state's failure to disclose an officer who took the drugs to the crime lab and whose testimony and the admission of a new crime lab report was not provided to the defendant because the officer's name was not previously provided on the state's witness list, in violation of discovery rules. The trial court found that the state apparently did not know about the officer's involvement in the case prior to trial, as the issue was raised during cross-examination of another officer, and the defendant presented no evidence of bad faith, therefore, it was within the trial court's discretion to allow defense counsel the opportunity to talk to the officer before the officer testified as a remedy for the discovery violation as opposed to granting a new trial or a mistrial. *Scott v. State*, 298 Ga. App. 376, 680 S.E.2d 482 (2009).

17-8-23. Grounds for granting of continuances — Absence of party generally.

JUDICIAL DECISIONS

Cited in *Hammond v. State*, 303 Ga. App. 176, 692 S.E.2d 760 (2010).

17-8-25. Grounds for granting of continuances — Absence of witness generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PRACTICE AND PROCEDURE
APPELLATE REVIEW

General Consideration

Witness that had not been subpoenaed. — Trial counsel was deficient on the ground that the defendant's counsel's motion for continuance did not comply with O.C.G.A. § 17-8-25 because the witness in question had not been subpoenaed and, thus, counsel could not comply with the statute; the defendant did not show that the trial court's denial of the motion for continuance was reversible error and did not demonstrate ineffective assistance of counsel. *Presley v. State*, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Continuance denied despite inability to contact state medical examiner. — Trial court did not abuse the court's discretion in denying the defendant's motion for a continuance on the ground that the defendant had not been able to contact the state medical examiner who conducted the autopsy on the victim. At the time the motion was argued, the defendant knew that the state would not be calling the examiner; moreover, as there was no dispute as to the victim's cause of death, stabbing, the examiner's testimony would not have been material to the defense. *Hudson v. State*, 284 Ga. 595, 669 S.E.2d 94 (2008).

Cited in *Theophile v. State*, 295 Ga. App. 517, 672 S.E.2d 479 (2009).

Practice and Procedure

Grounds for continuance not met.

There was no abuse of discretion in a trial court's denial of a defendant's continuance motion under O.C.G.A. § 17-8-25 due to the defendant's inability to locate a homeless man who was a witness to a vehicle accident that formed the basis for the criminal charges against the defendant, as the trial court provided the defendant with additional time to attempt to locate the witness, upon the defendant's failure to find the witness the trial court allowed the witness's prior testimony to be read into the record, and upon the location of the witness during the jury's deliberation, the same testimony was proffered from the live witness; further, the defendant had never subpoenaed the witness to appear at trial. *Potts v. State*, 296 Ga. App. 242, 674 S.E.2d 109 (2009).

Appellate Review

Grant of continuance proper.

Trial court did not abuse the court's discretion by allowing a continuance in order to allow the state to procure the attendance of a material witness with regard to a defendant's trial for trafficking marijuana and the fact that the continuance was granted ex parte did not change that result nor give the state an advantage over the defendant. *Mora v. State*, 292 Ga. App. 860, 666 S.E.2d 412 (2008).

17-8-30. Grounds for granting of continuances — Party or party's counsel in attendance at meeting of Board of Human Services or Board of Behavioral Health and Developmental Disabilities.

Should any member of the Board of Human Services or the Board of Behavioral Health and Developmental Disabilities be engaged at the time of any meeting of the board as counsel or party in any case pending in the courts of this state and should the case be called for trial during the regular session of the board, the absence of the member to attend the session shall be good ground for a postponement or a continuance of the case until the session of the board has ended. (Ga. L. 1933, p. 7, § 1; Code 1933, § 81-1405; Ga. L. 2009, p. 453, § 2-3/HB 228; Ga. L. 2010, p. 286, § 13/SB 244.)

The 2009 amendment, effective July 1, 2009, substituted "Board of Human Services" for "Board of Human Resources" near the beginning of this Code section.

The 2010 amendment, effective July

1, 2010, inserted "or the Board of Behavioral Health and Developmental Disabilities" near the beginning and substituted "the absence of the member" for "his absence" near the end.

17-8-33. Granting of continuances where indictment found or accusation made; continuance where material witness unavailable; continuances required by principles of justice; granting of continuance where postponement possible to later date in term.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in *Mora v. State*, 292 Ga. App. 860, 666 S.E.2d 412 (2008).

ARTICLE 3

CONDUCT OF PROCEEDINGS

17-8-54. Persons in courtroom when person under age of 16 testifies concerning sexual offense.

JUDICIAL DECISIONS

Allowing child victim's psychologist to remain in court not error. — With regard to a defendant's trial and conviction on various child sexual abuse

charges, the trial court did not violate O.C.G.A. § 17-8-54 as a result of clearing the courtroom of all spectators, with the exception of the victim's psychologist, who

remained in the courtroom during the testimony, when the child testified, as there was no evidence in the record that the psychologist improperly influenced the testimony of the victim and, consequently, the defendant failed to assert a valid basis for reversal. Further, the purpose of § 17-8-54 is to protect the interest of the child witness, not the defendant; thus, a failure to follow the statute did not violate the defendant's rights. *Driggers v. State*, 295 Ga. App. 711, 673 S.E.2d 95 (2009).

Prejudice not shown.

Defendant failed to show that the trial court violated the defendant's right to a public trial after the court cleared the courtroom of nonessential personnel when the youngest victim, who was four years old, testified because the defendant did not identify any specific people or category of people that were wrongly evicted. *Clark v. State*, 309 Ga. App. 749, 711 S.E.2d 339 (2011).

Waiver of constitutionality argument. — By failing to challenge the constitutionality of O.C.G.A. § 17-8-54 until after the child victim testified, the defendant waived the right to argue on appeal that the statute violated the defendant's constitutional right to a public trial. *Craven v. State*, 292 Ga. App. 592, 664 S.E.2d 921 (2008), cert. denied, 2008 Ga. LEXIS 935 (Ga. 2008).

Harmless error. — Although the trial court violated O.C.G.A. § 17-8-54 in removing the defendant's immediate family from the courtroom while the victim testified, the error was harmless. Other evidence, including testimony by the victim's family members, a pediatrician, a child protective services worker, a nurse, and a psychotherapist, supported the conviction. *Craven v. State*, 292 Ga. App. 592, 664 S.E.2d 921 (2008), cert. denied, 2008 Ga. LEXIS 935 (Ga. 2008).

RESEARCH REFERENCES

ALR. — Determination of request for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer — issues of proof, consideration of alternatives, and scope of closure, 32 ALR6th 171.

Basis for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer, 33 ALR6th 1.

17-8-55. Testimony of child ten years old or younger by closed circuit television; persons entitled to be present.

RESEARCH REFERENCES

ALR. — Determination of request for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer — issues of proof, consideration of alternatives, and scope of closure, 32 ALR6th 171.

Basis for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer, 33 ALR6th 1.

17-8-56. Writing out and reading of charge to jury; filing of charge; furnishing of copies of charge.

JUDICIAL DECISIONS

ANALYSIS

PRACTICE AND PROCEDURE

Practice and Procedure

Charge in a justification defense. — Jury instruction that ‘where the defense of justification is offered, it is the duty of the jury to consider it along with all the testimony in this case, and if the evidence, taken as a whole, raises reasonable doubt in the mind of the jury of the defendant’s guilt, then you should acquit him’ did not shift the burden of proof in defendant’s case; however, this charge should not be given in the future. Though not burden-shifting, the charge could have the possibility of being confusing in a close case. *Preston v. State*, 282 Ga. 210, 647 S.E.2d 260 (2007).

Essential elements of crime must be charged. — When certain legal offenses (i.e., felony, murder) constitute elements of the crime charged (i.e., criminal solicitation), even in the absence of a request to so charge, the trial court errs in failing to provide the jury with the legal definitions of the elemental crimes. The court will not presume, in the absence of a proper instruction from the court, that a jury is cognizant of the legal definition of an underlying offense and will apply the appropriate legal standard in deciding the case. *Essuon v. State*, 286 Ga. App. 869, 650 S.E.2d 409 (2007).

17-8-57. Expression or intimation of opinion by judge as to matters proved or guilt of accused.

Law reviews. — For annual survey of law on criminal law, see 62 Mercer L. Rev. 87 (2010).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

INQUIRIES BY THE JUDGE

RULINGS BY THE JUDGE

JURY CHARGES AND CURATIVE INSTRUCTIONS

NECESSITY FOR OBJECTION OR MOTION

General Consideration

O.C.G.A. § 17-8-57 is limited to remarks made before the jury.

Trial judge’s comments about venue and an open-container charge did not violate O.C.G.A. § 17-8-57 because the comments were made outside the jury’s presence, the case was reopened without any reference to the judge’s opinion, and the questions were then presented to the jury. Thus, there was no indication that the judge’s

comments in any way influenced, or even could have influenced, the jury. *Davenport v. State*, 308 Ga. App. 140, 706 S.E.2d 757 (2011).

When § 17-8-57 violated.

O.C.G.A. § 17-8-57 is violated only when a court’s charge assumes certain things as facts and intimates to the jury what the judge believes the evidence to be. *Hargett v. State*, 285 Ga. 82, 674 S.E.2d 261 (2009).

When expression of opinion as to what has been proved is error.

Court of appeals did not err by finding that the trial court violated O.C.G.A. § 17-8-57 by expressing an opinion as to whether venue had been proven because following the prosecutor's attempt to elicit testimony from a salesperson as to the salesperson's store's location, the trial court asked the state if venue was established and commented that there had been some confusion since a salesperson had worked at one store and was working in another one, and that the court just wanted to make sure; the comment "I just wanted to make sure," following the trial court's questioning of the salesperson, constituted an expression of opinion that venue had in fact been proven, and the plain language of § 17-8-57 provided for reversal of the entire case, not a portion thereof. *State v. Anderson*, 287 Ga. 159, 695 S.E.2d 26 (2010).

Expression of opinion as to an uncontested and undisputed fact, etc.

Fact that an item seized from defendant's person was cocaine was not contradicted at trial, and defendant personally referred to the substance as cocaine. Therefore, the trial court's comment that Exhibit 1 "is the cocaine" as the court collected the evidence was not an improper comment on the evidence contrary to O.C.G.A. § 17-8-57, and any error was cured by an instruction to the jury that whether or not the substance was cocaine was for the jury to determine. *Nelson v. State*, 305 Ga. App. 65, 699 S.E.2d 66 (2010).

Expression of opinion on issue of fact is not harmless.

Trial court violated O.C.G.A. § 17-8-57, requiring a reversal of the defendant's convictions, even though defense counsel did not object to the trial court's comments, because a violation of O.C.G.A. § 17-8-57 was always "plain error." *Murphy v. State*, 290 Ga. 459, 722 S.E.2d 51 (2012).

Colloquy regarding expanding the indictment due to additional evidence. — Trial judge's explanation to a defendant's counsel that based on the counsel's questioning of an investigator regarding the defendant's statement to

the investigator that the defendant lived in Florida, the judge was going to expand the indictment to include falsifying or concealing a material fact, which was one possible violation of O.C.G.A. § 16-10-20, when the defendant had only been charged with making a false statement, did not constitute an improper remark under O.C.G.A. § 17-8-57 because it was a colloquy with counsel regarding possible jury charges and did not express an opinion on what had or had not been proved. *Adams v. State*, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

Comments about control and preventing a disturbance. — Court found no violation of O.C.G.A. § 17-8-57 because: (1) the trial court's comment, made in an effort to keep the proceedings under control and to prevent a disturbance, warning defendant outside the presence of the jury that the defendant would be removed from the courtroom if the defendant could not stay under control, was not improper; and (2) the remaining comments were limited to a clarification of procedures and did not address the credibility of witnesses or any fact at issue in the trial, and thus, did not constitute a basis for reversal. *Linson v. State*, 287 Ga. 881, 700 S.E.2d 394 (2010).

If there is no conflict in the evidence on a certain point, etc.

Trial court did not err under O.C.G.A. § 17-8-57 by referring to the composition of exhibits which contained cocaine and ecstasy because there was never any dispute at trial as to the composition of the exhibits. *Foster v. State*, No. A11A2312, 2012 Ga. App. LEXIS 249 (Mar. 7, 2012).

Expression of opinion about witness's credibility. — Trial court violated O.C.G.A. § 17-8-57 by expressing the court's opinion about the credibility of a neighbor, who testified for the state at the defendant's trial, because the trial court's question and comment about the neighbor's testimony intimated the court's opinion that the testimony was believable since the neighbor was an independent witness, unrelated to any of the parties involved in the case; any reasonable juror, having heard the trial court's comments, could construe the comments as an ex-

pression of opinion on the neighbor's credibility, and the trial court's purported curative instruction did not eradicate the court's inappropriate comments. *Callaham v. State*, 305 Ga. App. 626, 700 S.E.2d 624 (2010).

Trial court violated O.C.G.A. § 17-8-57, requiring a reversal of the defendant's convictions because: (1) the jury could have interpreted the court calling a witness a "good detective" as expressing a favorable opinion of the witness's abilities and thus bolstering the witness's credibility; and (2) it was impossible to say the jurors were not influenced to some extent. *Murphy v. State*, 290 Ga. 459, 722 S.E.2d 51 (2012).

Trial court violated O.C.G.A. § 17-8-57, requiring a reversal of the defendant's convictions because: (1) the jury could have construed the court's comments on an officer's use of a written document and the officer's "best efforts" as expressing an opinion that the officer's recollection of the defendant's statement was reliable or credible; and (2) it was impossible to say the jurors were not influenced to some extent. *Murphy v. State*, 290 Ga. 459, 722 S.E.2d 51 (2012).

Remarks not opinion.

Court of appeals erred by reversing the defendant's convictions for armed robbery because the trial court did not violate O.C.G.A. § 17-8-57 when the court did not express or intimate the court's opinion as to what had or had not been proved since the court's directive to prove venue was followed by a question as to whether venue had been proven; in order to violate § 17-8-57, the trial court's comments must pertain to a disputed issue of fact. *State v. Gardner*, 286 Ga. 633, 690 S.E.2d 164 (2010).

Trial court did not improperly express the court's opinion of the case in front of the jury in violation of O.C.G.A. § 17-8-57 because, although the trial judge told the prosecution that the prosecution needed another witness after venue was put into question, the only possible inference was that venue had not been proven. Furthermore, the trial court was within the court's discretion to limit the scope of the testimony of the following witness to the issue of venue as the prosecution had

already rested the prosecutor's case; the trial court had discretion to propound the court's own questions to the witness; and the trial court never stated that the alleged crime took place in the county where the trial occurred and never expressed the court's opinion or commented on what had been proven. *Smith v. State*, 306 Ga. App. 693, 703 S.E.2d 329 (2010).

Trial court did not err when the court charged the jury by intimating the court's opinion as to defendant's credibility, in violation of O.C.G.A. § 17-8-57, because, when the charge on impeachment was considered in context, no reasonable juror could have construed it as an expression of the trial court's own opinion that defendant had been impeached or committed the alleged crimes. Moreover, the jury was instructed that the jury alone would decide whether defendant was guilty of a crime. *Pullen v. State*, No. A11A2360, 2012 Ga. App. LEXIS 327 (Mar. 23, 2012).

Trial court did not intimate an opinion on any facts or any of the evidence in violation of O.C.G.A. § 17-8-57 because the court's comments to the jury were limited to a clarification of procedures and did not address the credibility of witnesses or any fact at issue. *Ingram v. State*, 290 Ga. 500, 722 S.E.2d 714 (2012).

Judge's comments regarding appellate process violated statute. — Trial court violated O.C.G.A. § 17-8-57 by responding to the jury's request for "all of the evidence" that if the court gave the jury other items "it would be reversible error" and "we would have to try the case all over again"; these statements improperly referred to the availability of appellate review, intimating that the defendant was guilty and would need to appeal. *Gibson v. State*, 288 Ga. 617, 706 S.E.2d 412 (2011).

Judge explaining ruling.

Trial court did not improperly comment upon the evidence at trial because the court's statements were clearly intended to explain the court's ruling on the state's objection to defense counsel's closing argument. *Williams v. State*, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Trial court did not state an opinion on an expert's testimony in violation of O.C.G.A. § 17-8-57 because the trial court

exercised the court's judgment and discretion by stopping the testimony and explaining the court's evidentiary ruling to trial counsel. *Ridley v. State*, 725 S.E.2d 223, No. S11A1416, 2012 Ga. LEXIS 252 (2012).

Judge's comments about defendant's cross-examination techniques proper.

Although, in a criminal trial, a trial judge agreed with the prosecution that defense counsel's question mischaracterized a witness's plea bargain, the judge did not violate O.C.G.A. § 17-8-57 because: (1) the remark did not state or imply an opinion as to what had or had not been proved or as to a defendant's guilt; and (2) the remark merely exercised the judge's duty to manage the trial proceedings. *White v. State*, No. A11A2323; No. A11A2324, 2012 Ga. App. LEXIS 312 (Mar. 21, 2012).

Remarks tending to compliment or disparage witness.

While the trial court's casual colloquy with witnesses should have been minimized in front of the jury, the trial court's merely thanking a law enforcement witness, as a courtesy, for the officer's service as a witness did not rise to the level of improperly intimating an opinion about the testimony of the witness. *Foster v. State*, No. A11A2312, 2012 Ga. App. LEXIS 249 (Mar. 7, 2012).

Comment to keep clients under control due to laughing. — Trial court did not violate O.C.G.A. § 17-8-57 when it warned trial counsel about keeping the clients under control based on the defendant's inappropriate behavior in laughing as the comment was not directed toward a material issue nor was it an intimation on the defendant's guilt or innocence during the defendant's trial for aggravated assault and possession of a firearm during the commission of a crime. *Wright v. State*, 294 Ga. App. 20, 668 S.E.2d 505 (2008).

No violation by judge.

A 27-year-old rape victim was mentally retarded and had the mind of a 10-year-old. The trial court's solicitous attitude and comments to the victim did not constitute an expression of the court's opinion as to the defendant's guilt under

O.C.G.A. § 17-8-57, nor did it bolster the victim's credibility. *Kent v. State*, 294 Ga. App. 134, 668 S.E.2d 442 (2008).

Trial court did not violate O.C.G.A. § 17-8-57 when the court told the jury that the defendant's absence from the second day of trial was unexplained and that it would proceed in the defendant's absence. The statements did not express an opinion about whether the evidence had proven a material issue, whether a witness was credible, or whether the defendant was guilty; moreover, the statements were appropriate, as the statements were intended to explain the defendant's absence. *Howard v. State*, 298 Ga. App. 98, 679 S.E.2d 104 (2009).

Trial judge's comment to the jury while directing a verdict for a defendant on a count in the indictment that, "as the prosecutor explained in his opening statement, they were not going to bring a witness from Texas to testify as to that offense," did not improperly suggest to the jury that the trial judge believed the defendant to be guilty. *Dixon v. State*, 300 Ga. App. 183, 684 S.E.2d 679 (2009).

Trial court did not violate O.C.G.A. § 17-8-57 by commenting upon the intent and credibility of the state's witness in its curative instructions because the trial court's remarks did not express an opinion as to the credibility of the state's witness but were responsive to the defendant's objection to the witness's testimony and only served to explain the rationale for the trial court's decision to deny the defendant's motion for mistrial. *Kohler v. State*, 300 Ga. App. 692, 686 S.E.2d 328 (2009).

Trial judge did not violate O.C.G.A. § 17-8-57 by improperly commenting on the evidence because the trial judge's actions or remarks did not amount to an expression of opinion with regard to the defendant's guilt or innocence or to what had or had not been proven at trial in violation of § 17-8-57; the statute does not prohibit the trial judge from taking such measures as necessary to ensure the orderly administration of the trial, and the trial judge may even propound questions to a witness to clarify testimony when necessary in order to enforce the court's duty to ensure a fair trial. *Moore v. State*, 301 Ga. App. 220, 687 S.E.2d 259 (2009),

cert. denied, No. S10C0544, 2010 Ga. LEXIS 333 (Ga. 2010).

During the defendant's opening statement, the defendant in a DUI case, proceeding pro se, stated that the field sobriety tests had an accuracy rating of only 65 percent. The judge's comment interrupting the defendant and stating that the defendant would not have evidence to substantiate the statement was not an inadmissible judicial comment under O.C.G.A. § 17-8-57 because the opening statement was supposed to give the jury an outline of the evidence to be presented. *Steed v. State*, 309 Ga. App. 546, 710 S.E.2d 696 (2011).

Trial court's comments to a prosecution witness did not improperly bolster that witness's credibility because although some of the trial court's comments seemed to suggest approval of the witness and should have been avoided to prevent even the slightest intimation of partiality, the remarks did not undermine the integrity of the process or improperly enhance the credibility of the witness or comment upon what was proved or the defendant's guilt. *Holland v. State*, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Trial court did not impermissibly comment on the evidence when the court granted a directed verdict on the count of the indictment charging the defendant with felony murder based on the underlying crime of fleeing and attempting to elude police because during the court's main charge to the jury, the trial court emphasized to the jury that the court had no opinion as to what had or had not been proved regarding defendant's guilt; the trial court's statement regarding the existence of a scrivener's error in the indictment referred only to the incomplete count and did not contain an expression or intimation regarding the remaining counts of the indictment. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Trial court's single, isolated use of the term "swearing" was not impermissible under O.C.G.A. § 17-8-57 because, in the context of the testimony, it referred to the sworn trial testimony, not the trial court's opinion with regard to the facts at issue. *Foster v. State*, No. A11A2312, 2012 Ga. App. LEXIS 249 (Mar. 7, 2012).

Trial court's statement that the state would introduce evidence in support of the charges contained in the indictment did not violate O.C.G.A. § 17-8-57; judicial comments limited to a clarification of procedures and which do not address the credibility of witnesses or any fact at issue in the trial do not violate O.C.G.A. § 17-8-57. *Foster v. State*, 290 Ga. 599, 723 S.E.2d 663 (2012).

Judge's comment regarding venue was error.

It was reversible error under O.C.G.A. § 17-8-57 when the trial court asked the prosecutor whether venue had been established and, after the prosecutor responded, stated, "I just wanted to make sure." In making these comments, the trial court improperly expressed the court's opinion as to what had been proven on a disputed issue of fact; the fact that the defendant did not object was immaterial because a violation of § 17-8-47 was plain error. *Anderson v. State*, 297 Ga. App. 733, 678 S.E.2d 498 (2009), *aff'd*, 287 Ga. 159, 695 S.E.2d 26 (Ga. 2010).

Cited in *Connelly v. State*, 295 Ga. App. 765, 673 S.E.2d 274 (2009); *Tidwell v. State*, 306 Ga. App. 307, 701 S.E.2d 920 (2010); *Myers v. State*, 311 Ga. App. 668, 716 S.E.2d 772 (2011).

Inquiries by the Judge

Judge has right to propound questions to develop the truth of the case.

Trial court did not violate O.C.G.A. § 17-8-57 by questioning a state's witness regarding a prior statement the witness gave to police and its conflict with the witness's trial testimony, nor in repeating to the jury the state's contention as to what crime had been committed, nor in responding to jury questions without indicating what the trial court believed the evidence to be. *Finley v. State*, 286 Ga. 47, 685 S.E.2d 258 (2009).

Trial court did not violate O.C.G.A. § 17-8-57 by questioning an emergency room worker as to whether the worker had seen fresh or dried blood on the victim in a child cruelty case. Once the witness's testimony had been clarified on this relevant point, the trial court expressed no opinion as to what had been proved or its significance as to the defendant's guilt.

Chambers v. State, 313 Ga. App. 39, 720 S.E.2d 358 (2011).

Questions as to witness's truthfulness improper. — Trial court's questions to a witness in a forged/unauthorized prescription case, which consisted of asking the witness whether the witness was lying or being truthful, clearly intimidated the court's opinion regarding the credibility of the witness's testimony and were therefore patently improper under O.C.G.A. § 17-8-57, necessitating a new trial. Price v. State, 310 Ga. App. 132, 712 S.E.2d 135 (2011).

Inquiry of witness for clarification.

Trial court did not violate O.C.G.A. § 17-8-57 when the court questioned the victim's wife because the wife's testimony concerning prior statements in which she did not identify the defendant as the shooter of the victim was, at times, confusing and unclear, and the trial court's questions were posed for the purpose of clarifying her testimony and fully developing the truth of the case; questions posed merely for the purpose of clarifying certain testimony does not violate § 17-8-57. Callahan v. State, 305 Ga. App. 626, 700 S.E.2d 624 (2010).

Questions posed by a trial judge to a defendant's cousin, defendant's alibi witness, were aimed at clarifying the cousin's testimony and were not an expression or intimation regarding the evidence or the defendant's guilt, and were therefore not prohibited by O.C.G.A. § 17-8-57. Sims v. State, 306 Ga. App. 68, 701 S.E.2d 534 (2010).

O.C.G.A. § 17-8-57 did not prohibit a trial judge from taking such measures as necessary to ensure the orderly administration of a trial, and the court was permitted to propound questions to a witness to clarify testimony when necessary to enforce the court's duty to ensure a fair trial. Foster v. State, No. A11A2312, 2012 Ga. App. LEXIS 249 (Mar. 7, 2012).

Trial court can examine a witness.

When the judge in a criminal trial questioned witnesses called by both the defendant and the state about facts that could have been considered both beneficial and detrimental to each side's case, the judge's actions did not constitute statements of the judge's opinion, argumentative ques-

tioning by the judge, or extreme anxiety on the part of the judge to develop the truth as to facts which, if proved, would have been peculiarly beneficial to one of the parties in the case and correspondingly detrimental to the other, from which the jury could have inferred the court's opinion. Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Questions addressed to relevant issues.

Judge's questions in a shoplifting trial regarding whether the department store was located in Coweta County and whether the value of the items taken had been stated were proper questions to develop the case. Tyner v. State, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

Questions did not result in grave miscarriage of justice or affect fairness of proceeding. — At a defendant's trial for violating a county junk vehicle ordinance, a trial court's questions to a code inspector as to whether the vehicles were "junk vehicles" and whether the vehicles were properly licensed, and the court's question to the defendant as to whether the defendant had moved the vehicles so that the vehicles were no longer in the defendant's backyard or whether the defendant had merely moved the vehicles from one part of the defendant's backyard to another, were not so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or seriously affect the fairness, integrity, or public reputation of the judicial proceeding. Litman v. State, 304 Ga. App. 690, 697 S.E.2d 855 (2010).

Judge's interruption of closing argument did not express opinion. — Trial judge did not violate O.C.G.A. § 17-8-57 by interrupting defense counsel's closing argument because the judge's comment was not an improper expression of the judge's opinion of the case; rather, it was an accurate statement of the law. The judge simply interjected to instruct the jury on the applicable law as charged in the indictment, but did not comment on the evidence or the guilt of the defendant. Klausen v. State, 294 Ga. App. 463, 669 S.E.2d 460 (2008).

Comments on reliability of expert and one-on-one showups. — Trial court

did not violate O.C.G.A. § 17-8-57 by making comments about the reliability of an expert witness and of one-on-one show-ups because when the trial court interrupted defense counsel to make inquiry concerning the admissibility of testimony or the direction that counsel was going with a particular line of questioning, the trial court's comments did not constitute an opinion as to the proof or the guilt of the accused; the trial court promptly gave curative instructions disclaiming any intent by any ruling or comment to express an opinion on the facts of the case, on the credibility of any witness, or on the guilt or innocence of either defendant, stating that the questions in the case had to be decided by the jury, and expressing the trial court's absence of any inclination in the case. *Butler v. State*, 290 Ga. 412, 721 S.E.2d 876 (2012).

Comment to a juror during voir dire. — In a child enticement case under O.C.G.A. § 16-6-5(a), a trial court's comment to a juror that the juror did not look the juror's age during voir dire did not constitute improper comments on defendant's credibility under O.C.G.A. § 17-8-57 based on the defendant's claim that the defendant believed the child was older than the child said because the comment did not express an opinion as to what had or had not been proved. *Adams v. State*, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

Rulings by the Judge

Judge may give reasons for ruling.

Defense counsel cross-examined a witness, who admitted talking to another witness in the hallway; the trial court instructed the witness not to discuss the witness's testimony with anyone, and stated that as the conversation took place before any witnesses had been sworn, the rule of sequestration had not been violated. The trial court did not violate O.C.G.A. § 17-8-57 by expressing an opinion on the witness's credibility; the trial court was giving the reasons for the court's ruling, which did not violate § 17-8-57. *Rogers v. State*, 294 Ga. App. 195, 670 S.E.2d 106 (2008).

Because O.C.G.A. § 17-8-57 was not

violated by the trial court's remarks when giving reasons for a ruling, any objection to that comment by defendant's trial counsel would have been without merit. *Artis v. State*, 299 Ga. App. 287, 682 S.E.2d 375 (2009).

Appellate court rejected a DUI defendant's claim that the trial court erred in commenting on the evidence in violation of O.C.G.A. § 17-8-57; the trial court merely gave the court's reasons for refusing the jury's request to rehear the officer's testimony regarding the officer's observation of the defendant prior to administering the breathalyzer test. The trial court did not give an expression or intimation regarding the court's opinion as to the matters proved or the defendant's guilt. *Jacobson v. State*, 306 Ga. App. 815, 703 S.E.2d 376 (2010), cert. denied, No. S11C0498, 2011 Ga. LEXIS 582 (Ga. 2011).

On objections to testimony and evidence.

Although a defendant failed to object to certain judicial commentary, the remarks were not in violation of O.C.G.A. § 17-8-57 because the defendant failed to show plain error since the comments were made by the trial judge when ruling on objections by the state, assigned reasons for the rulings, and neither expressed an opinion nor a comment regarding the evidence. *Walker v. State*, 308 Ga. App. 176, 707 S.E.2d 122 (2011).

On admitting or excluding evidence.

The trial court did not make improper comments in violation of O.C.G.A. § 17-8-57 by ruling that exhibits reflecting defendant's pretrial statements would be admitted and published though the defendant objected. Pertinent remarks made by a trial court in discussing the admissibility of evidence or explaining its rulings do not constitute prohibited expressions of opinion. *Boyd v. State*, 286 Ga. 166, 686 S.E.2d 109 (2009).

Error in determining jury issue as a matter of law. — Trial court erred in convicting the defendant of riot in a penal institution under O.C.G.A. § 16-10-56 because the question of whether a county jail qualified as a penal institution under O.C.G.A. § 16-10-56 was properly for the

jury, and the trial court violated O.C.G.A. § 17-8-57 in determining the issue as a matter of law; whether the jail constituted a penal institution was an element of the offense, and the trial court's direction went beyond clarifying the law on a particular issue because it involved applying the law to the evidence to draw a conclusion on an element of the state's case. *Paul v. State*, 308 Ga. App. 275, 707 S.E.2d 171 (2011).

Jury Charges and Curative Instructions

Expression or intimation of opinion in jury charge as to what has been proved.

Trial counsel did not provide ineffective assistance by failing to object to an alleged violation of O.C.G.A. § 17-8-57 in a trial court's final charge because: (1) the jury instructions given on accomplice testimony tracked the standard pattern jury instruction; (2) the complained-of language adequately instructed the jurors that each of the defendants had been charged with multiple counts and the jurors were to consider each count independently in assessing whether evidence corroborating the testimony of a single witness was required; and (3) assuming that the cited language, in isolation, could be viewed as a "technical violation," it was clear that the charge did not otherwise assume things as facts and intimate to the jury what the judge believed the evidence to be, so the court's additional instructions concerning accomplice testimony corrected any error. *Garland v. State*, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

O.C.G.A. § 17-8-57 violated only when charge intimates opinion of judge as to evidence.

Trial court did not violate O.C.G.A. § 17-8-57 when the court instructed the jury on how to consider evidence of any custodial statements made by defendant as the instruction, taken as a whole, did not assume facts or intimate an opinion relating to defendant's custodial statements. *Milligan v. State*, 307 Ga. App. 1, 703 S.E.2d 1 (2010).

Trial court's comments did not violate O.C.G.A. § 17-8-57 because the comments amounted to no more than an explanation

that clarified the trial court's charge applicable to an alco-sensor field test. The trial court's explanation was a correct statement of the law pertaining to alco-sensor test results and did not express or intimate an opinion regarding the evidence. *Black v. State*, 309 Ga. App. 880, 711 S.E.2d 428 (2011).

Court's explanation for denying request of jury. — Trial court did not violate O.C.G.A. § 17-8-57 in presenting the court's reasons for denying the juror's request to see the cell phone used to facilitate drug trafficking since the court's comment was limited to a clarification of procedures and did not address the credibility of witnesses or any fact at issue in the trial. *Ferrell v. State*, 312 Ga. App. 122, 717 S.E.2d 705 (2011).

A slip of the tongue as to a single word, etc.

With regard to a defendant's convictions for aggravated sodomy and kidnapping, the misreading of the word "in" instead of "and" when the indictment was read to the jury regarding the aggravated sodomy count did not constitute an improper comment on the evidence. Considering the charge as a whole, the appellate court was satisfied that the jury could not have been misled or confused by the trial court's minor slip of the tongue since the singular use of "in" instead of "and" constituted harmless error. *Smith v. State*, 294 Ga. App. 692, 670 S.E.2d 191 (2008).

Failure to adjust charge to the evidence. — Trial court erred by not adjusting a charge regarding statements by the defendant to private persons to omit its reference to the situation in which such a statement was made while the defendant was in custody because there was no evidence in the defendant's case to show that the defendant had made any such statements while in custody, but it was highly probable that the charge, although not properly adjusted to the evidence actually presented at trial, did not contribute to the jury's guilt/innocence phase or sentencing phase verdicts; the charge simply provided the law governing the admissibility of certain types of statements without implying that any such statements existed. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Charge on impeachment. — Trial counsel was not effective for failing to object to an instruction regarding impeachment of a witness by proof of prior contradictory statements because the charge did not constitute an expression of opinion as to the guilt of the accused in violation of O.C.G.A. § 17-8-57; the charge stated the law accurately and was mere surplusage that did not mislead the jury. *Bellamy v. State*, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

Instruction on killing and then committing robbery. — Trial court did not unlawfully comment on the evidence in violation of O.C.G.A. § 17-8-57 when the court instructed the jury that an armed robbery could be committed by killing the victim first and then taking the property because the challenged charge neither assumed certain things as facts nor intimated to the jury what the trial court believed the evidence to be; it appeared that the defendant was arguing that the trial court gave an incorrect statement of law but couched the defendant's enumeration using § 17-8-57 because the defendant failed to object to the charge at defendant's trial, but parties cannot circumvent the requirements of O.C.G.A. § 17-8-58 with such a maneuver. *Vergara v. State*, 287 Ga. 194, 695 S.E.2d 215 (2010).

Charge on armed robbery not supported by any evidence. — Trial court's jury charge in an armed robbery trial suggested facts that were not supported by any evidence, specifically, that the assailant held the assailant's hand underneath the assailant's shirt during the robbery. The erroneous charge was an impermissible comment on the evidence in violation of O.C.G.A. § 17-8-57 and constituted plain error, entitling the defendant to a new trial. *Gonzalez v. State*, 306 Ga. App. 887, 703 S.E.2d 433 (2010).

Expression of opinion by court.

Trial court's failure to make a requested change to the pattern jury charge on mere presence did not result in an expression of the trial court's opinion as to what had been proved in violation of O.C.G.A. § 17-8-57 because the trial court's charge did not vary materially from the pattern charge or make any implication about

what the evidence in the case showed, but the instruction merely reflected an accurate statement of law; the trial court explicitly instructed the jury that no ruling or comment by the trial court was intended to express any opinion about the facts of the case or credibility of the witnesses or the guilt of the defendant. *Arnold v. State*, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

Instruction on justification proper as without commentary. — Trial court's jury instruction on justification was not erroneous for containing improper commentary because the statement in the charge neither intimated the trial court's opinion on what had or had not been proven nor intimated the trial court's opinion on the defendant's guilt or innocence. *Hall v. State*, 286 Ga. 358, 687 S.E.2d 819 (2010).

Charge on voluntary intoxication.

Trial court's charge on voluntary intoxication in a child molestation case was not an improper comment on the evidence under O.C.G.A. § 17-8-57, given evidence from all three complainants that defendant was drinking Wild Turkey bourbon and the victim's testimony that the victim believed defendant was drunk. *Bright v. State*, 301 Ga. App. 204, 687 S.E.2d 208 (2009).

Trial court's charge to the jury on voluntary intoxication did not constitute an improper expression of opinion evidence under O.C.G.A. § 17-8-57 because there was circumstantial evidence to support the giving of the charge, namely, testimony that alcohol was served at the party and that the defendant went to the liquor store to make a purchase; one witness testified that although the witness did not see the defendant consume alcohol, the witness "knew" that the defendant had in fact done so. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Necessity for Objection or Motion

Necessity for objection or motion for mistrial.

Trial court's statement during voir dire that the crimes allegedly took place near the intersection of Peachtree Road and Pharr Road in the Buckhead section of Atlanta was not objected to by the defen-

dant, and therefore the defendant's claim that the statement improperly relieved the state of its obligation to establish venue, violating O.C.G.A. § 17-8-57, was not preserved. *Green v. State*, 300 Ga. App. 688, 686 S.E.2d 271 (2009).

Plain error exception.

Violation of O.C.G.A. § 17-8-57 will always constitute "plain error," meaning that the failure to object at trial will not waive the issue on appeal, and on appeal, the issue is simply whether there was such a violation, and, if so, the statutory language is mandatory, and a violation of § 17-8-57 requires a new trial; to the extent the "plain error rule" has been articulated otherwise in the context of an alleged violation of § 17-8-57, such cases are disapproved. *State v. Gardner*, 286 Ga. 633, 690 S.E.2d 164 (2010).

Failure to object does not waive plain error.

Although the state argued that because defendant failed to object to any of the first three comments of which the defendant complained, the defendant waived any error, a violation of O.C.G.A. § 17-8-57 always constituted plain error, meaning that the failure to object at trial would not waive the issue on appeal. On appeal, the issue was simply whether there was such a violation; if so, it was well established that the statutory language was mandatory and that a violation of § 17-8-57 required a new trial. *Linson v. State*, 287 Ga. 881, 700 S.E.2d 394 (2010).

RESEARCH REFERENCES

ALR. — Disqualification or recusal of judge due to comments at Continuing Legal Education (CLE) seminar or other educational meetings, 49 ALR6th 93.

Justification and correction of remarks

or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as otherwise requiring new trial or reversal, 54 ALR6th 429.

17-8-58. Objections to jury charges prior to the jury retiring to deliberate; failure to raise objections.

JUDICIAL DECISIONS

Challenge to jury instruction waived. — Although defendant argued that the trial court failed to instruct the jury with the definition of attempt in conjunction with the court's jury charge on hijacking a motor vehicle, the trial court provided the jury with a complete instruction on the elements of hijacking a motor vehicle and defendant never requested a written charge on the definition of attempt and failed to specifically object to the trial court's failure to define attempt following completion of the jury charge. Accordingly, defendant's failure to preserve the error constituted a waiver of the issue. *Johnson v. State*, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

During the defendant's trial for aggravated stalking, aggravated assault, and making terroristic threats, the trial court did not err by failing to define "violent

contact" in its charge to the jury because the defendant did not request that the term be defined for the jury, and the defendant did not object to the trial court's failure to define violent contact; because the defendant did not specifically object to the failure of the trial court to instruct the jury on the definition of violent contact at the conclusion of the jury charge, the defendant waived the right to urge error on appeal. *Vaughn v. State*, 301 Ga. App. 55, 686 S.E.2d 847 (2009), overruled on other grounds, *State v. Kelly*, 290 Ga. 29, 718 S.E.2d 232 (2011).

Because a defendant specifically stated that the defendant had no objection to the jury charge after it was given, the defendant waived appellate review of the charge. In fact, as to three of the four charges challenged on appeal, the defendant requested the same charges, preclud-

ing review even if the charge given was plain error. *Blankenship v. State*, 301 Ga. App. 602, 688 S.E.2d 395 (2009).

Trial court's failure to give the defendant's requested supplemental charges could not be considered such plain error under O.C.G.A. § 17-8-58(b) as to offset the defendant's failure to object because the trial court gave the jury separate instructions that it was an affirmative defense that a person abandoned the persons's efforts to commit the crime and that when a defense is raised by the evidence the burden is on the state to negate or disprove the evidence beyond a reasonable doubt. *Mikell v. State*, 286 Ga. 434, 689 S.E.2d 286, overruled on other grounds, 287 Ga. 338, 698 S.E.2d 301 (2010).

Because the defendant failed to lodge a specific objection to a jury charge and to assert the grounds for defendant's objection, the defendant's claim that the trial court erred in instructing the jury was waived for purposes of appellate review; it was highly probable that the charge did not contribute to the verdict because there were identification witnesses who were acquainted with the defendant, and the trial court instructed the jury of the state's burden of proving the identity of the perpetrator beyond a reasonable doubt. *Hicks v. State*, 287 Ga. 260, 695 S.E.2d 195 (2010).

Trial court did not err in failing to instruct the jury that the defendant had no duty to retreat because the defendant's failure to object to the charge as given before the jury retired to deliberate constituted a waiver of the issue on appeal under O.C.G.A. § 17-8-58(a); even if justification was the defendant's sole defense, the issue of retreat on the defendant's part was not raised by the evidence because the defendant was not questioned as to why the defendant did not leave the scene. *Higginbotham v. State*, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial court did not unlawfully comment on the evidence in violation of O.C.G.A. § 17-8-57 when the court instructed the jury that an armed robbery could be committed by killing the victim first and then taking the property because the challenged charge neither assumed certain things as facts nor intimated to the jury

what the trial court believed the evidence to be; it appeared that the defendant was arguing that the trial court gave an incorrect statement of law but couched the defendant's enumeration using § 17-8-57 because the defendant failed to object to the charge at the defendant's trial, but parties could not circumvent the requirements of O.C.G.A. § 17-8-58 with such a maneuver. *Vergara v. State*, 287 Ga. 194, 695 S.E.2d 215 (2010).

Because there was no objection to a jury charge, any complaint with regard to the trial court's charge was waived. *Leverette v. State*, 303 Ga. App. 849, 696 S.E.2d 62 (2010).

Defendant's contentions that the trial court erred by failing to instruct the jury on Miranda and the defense of accident were waived for lack of a timely request or proper objection, and there was no plain error. *Crawford v. State*, 288 Ga. 425, 704 S.E.2d 772 (2011).

Under O.C.G.A. § 17-8-58(b), the defendant waived the defendant's right to urge error in the jury charge because following the court's charge to the jury, the trial court inquired whether there were any exceptions to the charge other than those previously stated, and the defendant's counsel renewed those objections, but at the charge conference, defense counsel did not object to the trial court's ruling that the court would not give the defendant's requested charges; as such, defense counsel's "renewal" of prior objections did not comply with O.C.G.A. § 17-8-58(a). *Lacey v. State*, 288 Ga. 341, 703 S.E.2d 617 (2010).

Trial court did not err in instructing the jury that the jury's verdict could not be influenced by sympathy or prejudice because after the trial court charged the jury, the defendant's counsel affirmatively stated that counsel had no objection to the jury instructions as given, and although the codefendant's counsel timely and specifically objected to the instruction, the defendant's counsel did not join in the objection, nor did defense counsel raise the objection when given another opportunity to do so before the jury returned the jury's verdict; therefore, pursuant to O.C.G.A. § 17-8-58(b), the defendant waived any objection to the instruction,

and there was no reasonable probability that the jury's verdict would have been different if the trial court had not given the instruction at issue. *Hughes v. State*, 309 Ga. App. 150, 709 S.E.2d 900 (2011).

Because the defendant was tried after the effective date of the 2007 amendment to O.C.G.A. § 17-8-58 and did not specifically object to an instruction regarding the prior difficulties the defendant had with the victim at the conclusion of the jury charge, the defendant waived the right to urge error on appeal. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Pursuant to O.C.G.A. § 17-8-58(a), the defendant waived the right to argue on appeal that the trial court erred in failing to instruct the jury on involuntary manslaughter and simple battery as lesser included offenses of felony murder because when the trial court asked if the defense had any exception to the jury instructions defense counsel replied "not as read"; the defendant did not assert that the failure to give the requested instructions constituted plain error under O.C.G.A. § 17-8-58(b), and no plain error appeared because only a charge on the greater offense of aggravated battery was warranted since the victim was seriously disfigured. *Cawthon v. State*, 289 Ga. 507, 713 S.E.2d 388 (2011).

Because there was no objection made at trial as to the instruction on venue, appellate review was precluded in that no portion of the jury charge constituted plain error which affected substantial rights of the parties. *Miller v. State*, 289 Ga. 854, 717 S.E.2d 179 (2011).

Because the defendant failed to object to the lack of a jury instruction on knowledge, the defendant waived that claim under O.C.G.A. § 17-8-58(b); the defendant did not establish that the defendant's substantial rights were affected because the defendant did not show that the omission of the pattern jury charge the defendant requested resulted in a miscarriage of justice, and the trial court's charge contained substantially the same principles as the charge the defendant requested. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Defendant's claim that the trial court made two omissions in the court's jury

instructions was not reviewed on appeal because the defendant made an objection that was unrelated to the omissions asserted on appeal and failed to reserve further objections even though the defendant was tried before the effective date of O.C.G.A. § 17-8-58; the defendant failed to make any written request for the omitted instructions. *Hill v. State*, 290 Ga. 493, 722 S.E.2d 708 (2012).

Failure to charge the jury on defense of accident waived. — In a vehicular homicide case, any error in the trial court's failure to charge the jury on the law of accident under O.C.G.A. § 16-2-2 was waived because the proposed charge was not in the record, and there was no evidence that it was the pattern charge, and the defendant failed to object after the charge was given as required by O.C.G.A. § 17-8-58(a). *Rouen v. State*, 312 Ga. App. 8, 717 S.E.2d 519 (2011).

Charge on truthfulness permitted. — Court of appeals could not consider the defendant's claims that the trial court's jury instructions were erroneous because the defendant requested two of the charges and made no objection to the remaining charge at any time during the trial; plain error under O.C.G.A. § 17-8-58(b) did not result from the trial court's reputation for truthfulness charge. *Bellamy v. State*, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

Instruction on impeachment. — Because the jury charge on impeachment made plain that the jury was the sole judge of witness credibility, the charge provided no cause for reversal, much less any "plain error" pursuant to O.C.G.A. § 17-8-58(b); the charge stated that a witness "may be" impeached, not that he or she "is" impeached, by proof of drug convictions, and the trial court at no time suggested that the court found the defendant's testimony less than credible, nor did the court otherwise impermissibly comment on the evidence by simply recognizing that the defendant's prior drug convictions were the only ones offered for impeachment purposes. *Collier v. State*, 288 Ga. 756, 707 S.E.2d 102 (2011).

Instructions on multiple defendants. — Trial court did not commit reversible error in the court's recharge by

failing to instruct the jury that a verdict for one defendant did not demand the same verdict for the co-defendant or that the charge had to be considered as a whole and that the initial charge and the recharge had to be given equal weight because the jury had been given the instructions in writing, and the codefendant failed to show any indication that the jury was confused or left with an erroneous impression of the law; neither the defendant nor the co-defendant specifically objected to the instruction before the jury retired to deliberate, nor did either the defendant nor the codefendant object to the recharge on any ground set forth in the appeal. *Howard v. State*, 288 Ga. 741, 707 S.E.2d 80 (2011).

Reserving objections to jury charge. — In a malice murder prosecution, defense counsel was not ineffective for not reserving objections to the trial court's jury charge generally as this procedure was not allowed under O.C.G.A. § 17-8-58. *Marshall v. State*, 285 Ga. 351, 676 S.E.2d 201 (2009).

Instruction on intelligence of witnesses. — Trial court did not commit reversible error, much less "plain error" pursuant to O.C.G.A. § 17-8-58(b), by instructing the jury that the jury could consider the intelligence of the witnesses to decide the witnesses' credibility because even assuming that the better practice was to omit intelligence as one of the factors in the credibility charge, its inclusion was not reversible error; because no reversible error occurred with respect to the jury instruction on credibility, the codefendant succeeded on the codefendant's alternative claim that trial counsel rendered ineffective assistance in failing to object to that instruction. *Howard v. State*, 288 Ga. 741, 707 S.E.2d 80 (2011).

Appellate review. — Although a defendant's counsel failed to object to a jury instruction that permitted the jury to find the defendant guilty of terrorist threats if the defendant threatened any crime of violence, whereas the indictment charged that the defendant threatened to kill the victim, the appellate court was authorized to review the instructions for plain error, because the defendant alleged a due process violation. However, no error was

found. *Martin v. State*, 303 Ga. App. 117, 692 S.E.2d 741 (2010).

Pursuant to O.C.G.A. § 17-8-58(b), an error in a jury charge was considered on appeal notwithstanding the appellant's failure to object at trial because the charge constituted plain error which affected the appellant's substantial rights. *Craft v. State*, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Because the language of O.C.G.A. § 17-8-58 refers to the jury "charge", the statute applies not only to instructions given orally to the jury, but necessarily must apply to any written instructions given to the jury, and preprinted verdict forms have been treated as a portion of the jury instructions; use of such a form is intended to assist the jury in arriving at a lawful verdict, and a party is necessarily obligated to raise any objection to such a form as set forth in O.C.G.A. § 17-8-58(a) and, accordingly, when objection is not made, error is reviewed as provided in O.C.G.A. § 17-8-58(b). *Cheddersingh v. State*, 290 Ga. 680, 724 S.E.2d 366 (2012).

Because the defendant failed to object to the trial court's instruction, the defendant's claim on appeal was subject only to plain error review under O.C.G.A. § 17-8-58. *Dukes v. State*, 290 Ga. 486, 722 S.E.2d 701 (2012).

Because the defendant voiced no objection to the jury charge as given other than to renew a request for a lesser included offense, absent plain error, the issue was precluded from appellate review pursuant to O.C.G.A. § 17-8-58(b). *Sanders v. State*, 290 Ga. 637, 723 S.E.2d 436 (2012).

No error found. — To the extent the defendant sought review under O.C.G.A. § 17-8-58(b), of the trial court's charge to the jury on its consideration of child molestation, attempted child molestation, and indecent exposure, there was no error because the trial court explained that the jury needed to consider all three offenses at the same time and properly explained how the jury would record its verdict. *Machado v. State*, 300 Ga. App. 459, 685 S.E.2d 428 (2009).

Trial court's failure to define "intent to distribute" when charging on intent to distribute marijuana under O.C.G.A. § 16-13-30(j)(1) was not error; the term

“distribute” possessed only the ordinary and common dictionary meaning and did not need to be specifically defined. The defendant failed to object to the charge without the definition, and the charge as given was not plain error excusing the failure to object under O.C.G.A. § 17-8-58(b). *Boring v. State*, 303 Ga. App. 576, 694 S.E.2d 157 (2010).

Trial court did not commit plain error in instructing the jury that when operating a motor vehicle, every licensee had to display his or her license upon the demand of a law enforcement officer because there was no reasonable probability that the charge to the jury, when viewed as a whole, permitted the defendant's conviction under an erroneous theory; the trial court's charge enumerated for the jury the specific offenses with which the defendant was charged and instructed the jury to determine whether the defendant was guilty of those offenses, and it did not instruct the jury to determine whether the defendant was guilty of a violation of O.C.G.A. § 40-5-29. *Edwards v. State*, 308 Ga. App. 569, 707 S.E.2d 917 (2011).

During the defendant's trial for malice murder, the trial court did not commit reversible error, much less any “plain error” pursuant to O.C.G.A. § 17-8-58(b) by giving the pattern jury charge on voluntary manslaughter involving mutual combat because the trial court gave separate and full instructions on voluntary manslaughter, malice murder, and justification, and the jury, hearing the challenged instruction in the context of the charge as a whole and the evidence presented at trial, was not likely to be confused by the trial court's slip of the tongue; the defendant failed to inform the trial court of the specific objection and the grounds for such objection before the jury retired to deliberate; thus, O.C.G.A. § 17-8-58(a) thereby precluded appellate review of such portion of the jury charge. *Dolphy v. State*, 288 Ga. 705, 707 S.E.2d 56 (2011).

There was no reversible error, much less any “plain error” pursuant to O.C.G.A. § 17-8-58(b), because the statement the trial court made to the jury could not be considered coercive since the statement did not imply in any way that a verdict was required; the trial court did

not emphasize the expense of trying the case, and the court's statement did not amount to an instruction for the jury to consider that expense in the jury's deliberations. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Trial court's instruction to the jury on alternative ways that the state could prove the state's case after deliberations had started and after questions had been asked by the jury was not plain error under O.C.G.A. § 17-8-58 as the court had previously upheld such a charge as reflecting a correct statement of law, and when considered with the jury charges given as a whole and the evidence in the case, there was no indication that the charge improperly affected the outcome of the proceeding. *Emerson v. State*, No. A11A1902, 2012 Ga. App. LEXIS 331 (Mar. 23, 2012).

There was no plain error in the trial court's charge to the jury that no criminal liability would attach if the defendant killed a neighbor's dog in order to protect livestock because the trial court's charge on animal cruelty, as a whole, was consistent with the language of O.C.G.A. § 16-12-4, and the charge adequately explained to the jury that a person was not prohibited from killing an animal if necessary to protect his or her person or property or that of another. *Futch v. State*, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

No plain error found. — Trial court did not commit reversible error, much less “plain error” pursuant to O.C.G.A. § 17-8-58(b), by failing to inform the jury of the definition of simple assault because the defendant's defense was mistaken identity, and the undisputed evidence showed that the perpetrators intentionally fired the perpetrators' guns through a parking lot occupied by many pedestrians and in the direction of a vehicle; neither negligence nor reckless conduct was an issue and, thus, any error in the charge would not have affected the outcome of the case. *Howard v. State*, 288 Ga. 741, 707 S.E.2d 80 (2011).

There was no reversible error, much less any “plain error” pursuant to O.C.G.A. § 17-8-58(b), in the trial court's decision to give a prior difficulties charge to the jury because evidence was pre-

sented regarding prior difficulties between the defendant and the victim; thus, the inclusion of a prior difficulties charge did not constitute an impermissible comment on the evidence. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Although a jury was not explicitly instructed that the jury was required to find that a defendant was acting in a dangerous manner in order to convict the defendant of felony murder based on theft by receiving, the jury did in fact make such a finding when the jury found the defendant guilty of vehicular homicide by reckless driving because that offense, by definition, created a foreseeable risk of death. Because the proceedings were not affected, there was no plain error. *State v. Kelly*, 290 Ga. 29, 718 S.E.2d 232 (2011).

Defendant's trial counsel failed to preserve objections to the trial court's recharge of the jury under O.C.G.A. § 17-8-58. The trial court's instruction regarding self-defense as applicable to all counts was not plain error. *Guajardo v. State*, 290 Ga. 172, 718 S.E.2d 292 (2011).

Trial court's failure to recharge on corroboration was not plain error under O.C.G.A. § 17-8-58(b) or substantial error that was harmful as a matter of law under O.C.G.A. § 5-5-24(c) because in the court's instructions to the jury following closing argument, the trial court properly charged the jury that no person would be convicted of terroristic threats on the unsupported testimony of the party to whom the threat was made. *Tidwell v. State*, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Although a defendant failed to object to a jury instruction that the defendant contended allowed the jury to consider an alternative way to convict the defendant for false imprisonment from the facts alleged in the indictment, the court could consider whether the giving of the instruction constituted plain error. Because the trial court gave limiting instructions that the jury was only to consider the crimes as charged in the indictment, the charge was not plain error. *Schneider v. State*, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Trial court did not err in failing to instruct the jury on the law regarding proximate cause and its relationship to

felony murder because the omission of additional language concerning proximate cause could not be considered a clear or obvious error under O.C.G.A. § 17-8-58; the jury was instructed that to find the defendant guilty of felony murder while in the commission of felony criminal attempt to possess cocaine, the jury had to find beyond a reasonable doubt that the felony was dangerous per se or, by the attendant circumstances in the case, created a foreseeable risk of death, and the jury was also instructed that for felony murder to be found, the jury had to find that, in the commission of the underlying felony, the defendant caused the death of another human being irrespective of malice. *Sapp v. State*, 290 Ga. 247, 719 S.E.2d 434 (2011).

Trial court's refusal to give the defendant's requested jury instruction on mutual combat, O.C.G.A. § 16-3-21(b)(3), did not constitute plain error under O.C.G.A. § 17-8-58(b) because a charge on mutual combat was not adjusted to the evidence; there was no evidence of intent to engage in a mutual fight or combat by agreement. *Carruth v. State*, 290 Ga. 342, 721 S.E.2d 80 (2012).

In a defendant's trial for possession of a firearm during the commission of a crime, the trial court properly instructed the jury that there must have been a joint operation of an act or omission to act and intention, that intent was an essential element of any crime, and that there was no presumption that the defendant acted with criminal intent. Therefore, any omitted language regarding the defendant's knowledge did not contribute to the outcome of the trial. *Morrell v. State*, 313 Ga. App. 443, 721 S.E.2d 643 (2011).

Trial court's failure to give jury charges on transferred justification and transferred intent did not amount to plain error because such omission did not affect the outcome of the proceedings when the instructions as a whole made it clear that the jury should acquit the defendant if the jury determined that the defendant was justified in firing the weapon, regardless of who the bullet struck. *Allen v. State*, 290 Ga. 743, 723 S.E.2d 684 (2012).

Trial court's failure to give an instruction on no duty to retreat did not consti-

tute plain error under O.C.G.A. § 17-8-58; even assuming that the charge should have been given sua sponte by the trial court, the failure to give the charge did not amount to plain error since self-defense was not the defendant's sole defense. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Charge on voluntary intoxication did not constitute plain error under O.C.G.A. § 17-8-58 because the charge on voluntary intoxication stated as a prerequisite to the statute's applicability the fact that the person was legally sane, i.e, that the person's mind was capable of distinguishing right from wrong and of reasoning and acting rationally, when not affected by intoxicants. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Trial court did not err by instructing the jury that the jury had to reach a unanimous verdict because viewing the charges as a whole, it appeared that the jury was adequately and properly instructed that any voluntary verdict that the jury reached had to be unanimous. *Dukes v. State*, 290 Ga. 486, 722 S.E.2d 701 (2012).

Giving of disapproved jury charge was plain error. — Jury charge that a DUI defendant's refusal to submit to a blood alcohol test could create an inference that the test would show the pres-

ence of alcohol which impaired the driver's driving was plain error, requiring a new trial, because the charge shifted the burden of proof to the defendant, requiring the driver to rebut the inference that the driver was an impaired driver. *Wagner v. State*, 311 Ga. App. 589, 716 S.E.2d 633 (2011).

Verdict form constituted plain error. — Preprinted verdict form constituted plain error under O.C.G.A. § 17-8-58(b) because the form affected the defendant's substantial rights by actively removing the presumption of innocence from the defendant's trial; the defendant did not intentionally relinquish the right to have the burden of proof properly stated in the verdict form because the defendant's failure to object was more appropriately described as a forfeiture of the right. *Cheddersingh v. State*, 290 Ga. 680, 724 S.E.2d 366 (2012).

Cited in *Gresham v. State*, 289 Ga. 103, 709 S.E.2d 780 (2011); *Fairwell v. State*, 311 Ga. App. 834, 717 S.E.2d 332 (2011); *Tidwell v. State*, 312 Ga. App. 468, 718 S.E.2d 808 (2011); *Alvarez v. State*, 312 Ga. App. 552, 718 S.E.2d 884 (2011); *Bishop v. State*, No. A11A2140, 2012 Ga. App. LEXIS 286 (Mar. 15, 2012); *Morgan v. State*, 725 S.E.2d 255, No. S11A1386, 2012 Ga. LEXIS 285 (2012).

ARTICLE 4

CONDUCT AND ARGUMENT OF COUNSEL

17-8-71. Order of argument after evidence presented.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
OPENING AND CLOSING BY DEFENDANT
WAIVER OF RIGHT TO OPEN AND CLOSE

General Consideration

Procedure in trial on defendant's claim of mental retardation. — Trial of a habeas corpus petitioner's claim of mental retardation should be regarded as a completion of the guilt/innocence phase of

the petitioner's original trial and, therefore, the state was entitled under Ga. Unif. Super. Ct. R. 10.2 to make an opening statement before the petitioner. Under O.C.G.A. § 17-8-71, the state was entitled to make an initial closing argument, the petitioner could then make the petition-

er's closing argument, and the state was entitled to make a final closing argument. *Stripling v. State*, 289 Ga. 370, 711 S.E.2d 665 (2011).

Ineffectiveness of counsel.

Defendant did not show that trial counsel was ineffective by failing to request rebuttal time following the State of Georgia's closing statement because the defendant had no right under O.C.G.A. § 17-8-71 to make a rebuttal argument. *Cobb v. State*, 309 Ga. App. 70, 709 S.E.2d 9 (2011).

Cited in *Lewis v. State*, 292 Ga. App. 257, 663 S.E.2d 721 (2008); *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854 (2010).

Opening and Closing by Defendant

Introduction of prior written inconsistent witness statement did not impact defendant's right to open and close. — Although a trial court erred in requiring a defendant to introduce a prior inconsistent written statement of a witness into evidence before using the state-

ment to impeach the witness, that error did not cause harm to the defendant by causing the defendant to lose the right to open and conclude the argument to the jury under former O.C.G.A. § 17-8-71 because the record showed that the defendant introduced an abundance of other evidence that had the same effect under the statute. *Jackson v. State*, 292 Ga. App. 312, 665 S.E.2d 20 (2008).

Waiver of Right to Open and Close

Waiver by defendant's counsel. — As counsel's decision to call a defense witness, thus forfeiting the right to make the final closing argument under O.C.G.A. § 17-8-71, was not patently unreasonable, and as the defendant provided no basis for concluding that the result of the trial would have been different if the defendant had the last closing argument, the defendant did not show counsel was ineffective. *McKenzie v. State*, 284 Ga. 342, 667 S.E.2d 43 (2008).

17-8-73. Time limits on closing argument — Noncapital and capital felony cases.

JUDICIAL DECISIONS

Reduced time harmless error.

Although the trial court erred in limiting closing arguments to one hour's duration, defendant's right to make a two-hour closing was not abridged by the trial court's misstatement of O.C.G.A. § 17-8-73, since counsel had informed the trial court of counsel's plan to deliver a 30-minute closing argument and since counsel was not interrupted during the delivery of closing argument by the trial

court. *Stovall v. State*, 287 Ga. 415, 696 S.E.2d 633 (2010).

Using less time than allotted not ineffective assistance. — Existence of the statutory right to make a two-hour closing argument in a murder case does not mean that an attorney acts incompetently whenever the attorney decides to use less than the whole two hours. *Brown v. State*, 288 Ga. 902, 708 S.E.2d 294 (2011).

17-8-75. Improper statements by counsel.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONDUCT OF COUNSEL

REQUIREMENT THAT OBJECTION OR MOTION BE MADE

REBUKE OF COUNSEL, INSTRUCTION OF JURY, OR GRANT OF MOTION BY COURT

DISCRETION OF COURT

General Consideration

Questioning by defense counsel of investigator did not merit mistrial. —

The trial court was not required to declare a mistrial under O.C.G.A. § 17-8-75 when defense counsel cross-examined an investigator about similar crimes. Defense counsel had not made an improper argument, but merely attempted to introduce evidence into the record for strategic reasons by questioning a witness. *Gary v. State*, 291 Ga. App. 757, 662 S.E.2d 742 (2008).

Harmless error.

Although the trial court erred in not fulfilling its duty under O.C.G.A. § 17-8-75 when the prosecutor's remark regarding what the defendant had told deputies was a misstatement of the evidence, the error was harmless because it was highly probable that the trial court's error did not contribute to the verdicts; the improper statement, consisting of one sentence, was interrupted by defense counsel's prompt objection, the trial court immediately observed that the jury would remember the evidence, and the trial court charged the jury fully as to what constituted evidence, including instructing them that evidence did not include the attorneys' opening statements or closing arguments. *Arrington v. State*, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, U.S. , 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Prosecutor's argument went slightly beyond the trial testimony by describing a video game as involving the use of "bludgeoning objects to kill somebody," and the trial court erred by failing to rebuke counsel and to instruct the jury to disregard the unauthorized argument, as was required by O.C.G.A. § 17-8-75, but the error was not reversible error because it was highly probable that the prosecutor's minor misstatement of the evidence, particularly in light of the trial court's subsequent statement to the jury that the jury had to determine what evidence was actually presented, did not contribute to the sentencing verdict. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Cited in *Hernandez v. State*, 291 Ga. App. 562, 662 S.E.2d 325 (2008); *Whatley v. State*, 296 Ga. App. 72, 673 S.E.2d 510 (2009); *Henderson v. State*, 285 Ga. 240, 675 S.E.2d 28 (2009).

Conduct of Counsel

No duty of defense counsel to request additional remedies. — Nowhere in O.C.G.A. § 17-8-75 is there a requirement for defense counsel to specifically request additional remedies after interposing an objection to the improper statements made by a prosecutor; to the contrary, the plain language of O.C.G.A. § 17-8-75 refers to the trial court's independent duty, after defense counsel's objection, to rebuke the prosecutor, give an appropriate curative instruction, or grant a mistrial in the event that the prosecutor has injected into the case prejudicial statements on matters outside of the evidence. *O'Neal v. State*, 288 Ga. 219, 702 S.E.2d 288 (2010).

Prosecutor's comments that "you get an attorney." — Prosecutor's comments that in this country, "you get an attorney," were ambiguous as to whether defendant's counsel was appointed instead of retained, and did not constitute statements of prejudicial matters which were not in evidence as would be precluded by O.C.G.A. § 17-8-75. *Ham v. State*, 303 Ga. App. 232, 692 S.E.2d 828 (2010).

Prosecutor's closing argument, etc.

Prosecutor's statements during closing argument were within the wide leeway granted to counsel to argue all reasonable inferences from the evidence pursuant to O.C.G.A. § 17-8-75(c), including that a former girlfriend whom the defendant forced to purchase a gun was fearful of the surroundings and that another girlfriend was a battered woman, such that there was no cause to grant a new trial. *Varner v. State*, 285 Ga. 300, 676 S.E.2d 189 (2009).

Prosecutor's comments did not warrant mistrial.

Trial court did not err in denying the defendant's motion for mistrial on the ground that the state made improper arguments in closing because the challenged comments referred to evidence in the case,

which was the defendant's refusal to submit to testing and other manifestations of impairment, and, thus, were not improper under O.C.G.A. § 17-8-75; considering the strength of the state's evidence, it was highly unlikely that the prosecutor's closing argument contributed to the guilty verdict. *Crusselle v. State*, 303 Ga. App. 879, 694 S.E.2d 707 (2010).

Trial court did not deprive the defendant of a fair trial by failing to declare a mistrial sua sponte after the prosecutor showed the jury slides during the prosecutor's opening statement because when the defendant objected, the trial court took immediate corrective action, ordering that the slides be taken down, and the defendant did not seek additional relief in the form of a curative instruction or a mistrial; the trial court did not abuse the court's discretion in concluding that the slides were inappropriately argumentative for opening statement, and the trial court instructed the jury before opening statements and again after the close of the evidence that the prosecutor's opening statements were not evidence. *Dolphy v. State*, 288 Ga. 705, 707 S.E.2d 56 (2011).

Trial court discharged the court's duties properly when the court allowed the prosecutor to state, during closing arguments, that the defendant had made an obscene gesture to someone in the courtroom during the course of the trial because the defendant offered no evidence that the gesture was incorrectly attributed to the defendant. *Jeffers v. State*, 290 Ga. 311, 721 S.E.2d 86 (2012).

Trial court did not abuse the court's discretion in denying the defendant a mistrial because there was no indication that either the jury or the trial court heard the prosecutor's remark that the defendant was "swaying" during the defendant's horizontal gaze nystagmus test nor was the remark recorded; the trial court explained to the jury, both in the court's preliminary and closing instructions, that evidence consisted only of witness testimony and exhibits and that the jurors were to decide the case for themselves, based solely on the testimony heard from the witness stand and any exhibits admitted into evidence. *Travis v. State*, 314 Ga. App. 280, 724 S.E.2d 15 (2012).

Requirement that Objection or Motion Be Made

Improper remarks must be properly excepted to in order to warrant new trial.

A trial court did not err by allowing the state to make improper and prejudicial comments during defendant's trial on drug-related offenses as defense counsel only objected to the prosecutor's statement recounting defendant's previous conviction and did not object to the two questions posed by the prosecutor, which questions implied that the prosecutor personally believed that defendant was guilty of the charged offense. Thus, the issue of whether those two questions constituted improper remarks was waived on appeal. *Heard v. State*, 291 Ga. App. 550, 662 S.E.2d 310 (2008).

Because the defendant either failed to object or had an objection sustained as to questions or statements made by the prosecutor, there was no ruling by the trial court that was adverse to the defendant for the court of appeals to review; the court of appeals will not reverse a conviction based on alleged prosecutorial misconduct when the defendant did not take proper exception or when the defendant received a favorable ruling on any objection or requested corrective action. *Willis v. State*, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Defendant's argument that the trial court erred in finding that the court did not have a sua sponte duty to intervene and prevent the prosecutor's statement regarding the codefendants' pleas of guilty was waived because no objection was made during trial. *Tucker v. State*, 313 Ga. App. 537, 722 S.E.2d 139 (2012).

Defendant waived the argument that the trial court erred in allowing the prosecutor to state, during closing arguments, that the defendant had made an obscene gesture to someone in the courtroom during the course of the trial because there was no contemporaneous objection to the argument. *Jeffers v. State*, 290 Ga. 311, 721 S.E.2d 86 (2012).

No duty to reprimand counsel absent motion.

Trial court was not required sua sponte

to prevent the state from making improper remarks during the state's closing argument because the defendant did not object to the closing argument; O.C.G.A. § 17-8-75 only requires the judge to act when counsel makes a timely objection. *Tidwell v. State*, 306 Ga. App. 307, 701 S.E.2d 920 (2010).

Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court

Duty of judge to prevent improper argument generally.

Trial court erred by failing to fulfill the court's duty under O.C.G.A. § 17-8-75 to rebuke the prosecutor and instruct the jury in order to remove any improper impression that could have been left in the jury's minds, and the court of appeals erred in concluding that the defendant waived review of the defendant's claim that the trial court erred by failing to give a curative instruction after the defendant objected to the state's closing argument by failing to obtain a ruling on the defendant's request for a curative instruction; the plain language of O.C.G.A. § 17-8-75 speaks in terms of the trial court's duty to give a curative instruction when a proper objection is made to the state's introduction of improper argument on matters that are not in evidence, and a mere objection is sufficient to preserve the issue for appellate review. *O'Neal v. State*, 288 Ga. 219, 702 S.E.2d 288 (2010).

Abuse of discretion not shown.

Trial court did not abuse the court's discretion by not declaring a mistrial as the court issued a curative instruction after the prosecutor made improper remarks during closing argument by twice referring to the defendant's possession of marijuana as a misdemeanor, rather than the charged offense of possession of marijuana less than an ounce. *Dix v. State*, 307 Ga. App. 684, 705 S.E.2d 903 (2011).

Improper remark of prosecutor cured by instruction.

Prosecutor's improper comment on a defendant's failure to explain the presence of a gun and cash in the defendant's car immediately following a robbery was cured by the trial court rebuking the prosecutor at length and giving the jury cura-

tive instructions. *Brown v. State*, 307 Ga. App. 797, 706 S.E.2d 170 (2011).

Failure of court to rebuke counsel, instruct jury, or grant mistrial.

With regard to defendant's trial and conviction for possession of methamphetamine and giving a false name to a law enforcement officer, although the prosecutor's argument was improper and the trial court erred by failing to rebuke the prosecutor as required by O.C.G.A. § 17-8-75, the error was harmless since the improper argument consisted only of one comment not directly related to defendant's case, the trial court twice told the jurors that the arguments of counsel were not evidence, and there was ample evidence of defendant's guilt. As such, the trial court's failure to perform the court's duty under § 17-8-75 did not contribute to the verdict. *Griffin v. State*, 291 Ga. App. 657, 662 S.E.2d 767 (2008).

Trial court's error in failing to give a curative instruction in compliance with O.C.G.A. § 17-8-75 was harmless because it was highly probable that the trial court's error did not contribute to the verdict; the trial court specifically instructed the jury that the closing arguments of counsel did not constitute evidence, and despite the overwhelming evidence of the defendant's guilt, the jury was unable to reach a verdict on two of the counts against the defendant that were later dead docketed. *O'Neal v. State*, 288 Ga. 219, 702 S.E.2d 288 (2010).

Prosecutor's statements were outside of the evidence because the slides the prosecutor introduced were shown during opening statement before either side had put on any evidence; however, it was highly probable that the trial court's alleged error in failing to comply with O.C.G.A. § 17-8-75 by not rebuking counsel or specifically instructing the jury to disregard the slides did not contribute to the guilty verdicts because it was doubtful that the slides qualified as prejudicial within the meaning of O.C.G.A. § 17-8-75 since the slides reflected evidence that the prosecutor expected to and, ultimately did, get admitted during the trial and argument that would be, and ultimately was, properly made during closing argument, so the same information later reached the jury

appropriately. *Dolphy v. State*, 288 Ga. 705, 707 S.E.2d 56 (2011).

Curative instruction sufficient. — Defendant's request not to be prosecuted was not a confession and therefore was not erroneously admitted under O.C.G.A. § 24-3-50; the request not to be prosecuted was not a confession because the request did not admit every element of the crime and did not acknowledge guilt. Further, the trial court complied with O.C.G.A. § 17-8-75 by giving a curative instruction as the question asked by the district attorney was not an impermissible reference to a confession made during plea negotiations and further instructed

the jury that the district attorney's question was not evidence. *McMahon v. State*, 308 Ga. App. 292, 707 S.E.2d 528 (2011).

Discretion of Court

Trial court ruling prohibiting comment on spouse's plea agreement. — With regard to a defendant's drug conviction, the trial court did not err in prohibiting further comment by defense counsel about the terms of the plea agreement of the defendant's spouse as the state had objected and the terms of the plea agreement had not been admitted into evidence. *Dingler v. State*, 293 Ga. App. 27, 666 S.E.2d 441 (2008).

17-8-76. Argument to or in front of jury as to possibility of clemency.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in *Daniel v. State*, 292 Ga. App. 560, 665 S.E.2d 696 (2008).

CHAPTER 9

VERDICT AND JUDGMENT GENERALLY

Article 2

Rendition and Receipt of Verdict

Sec.
17-9-20. (Effective January 1, 2013. See

note.) Action by juror on private knowledge as to facts, witnesses, or parties.

RESEARCH REFERENCES

ALR. — Interrogation or poll of jurors, during criminal trial, as to whether they were exposed to media publicity pertaining to alleged crime or trial, 55 ALR6th 157.

ARTICLE 1
GENERAL PROVISIONS

17-9-1. When direction of verdict of acquittal authorized; when motion for directed verdict of acquittal allowed; effect of motion upon defendant’s right to present evidence and right to jury trial; assent of jury not required.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- EVIDENCE
- APPLICATION
- PRACTICE AND PROCEDURE

General Consideration

No provision for motion for judgment of not guilty notwithstanding verdict of guilty.

Trial court did not err in denying the defendant’s motion for judgment notwithstanding the verdict (JNOV) after the defendant was convicted of driving under the influence to the extent that the defendant was a less-safe driver in violation of O.C.G.A. § 40-6-391(a)(1) because JNOV was not a remedy available in a criminal case. *Masood v. State*, 313 Ga. App. 549, 722 S.E.2d 149 (2012).

Directed verdict was moot.

Any error in the trial court’s failure to grant a defendant’s motion for a directed verdict was harmless because an acquittal rendered the motion moot; pretermittting whether the trial court erred in denying the defendant’s motion for a directed verdict, the jury found defendant not guilty. *Brown v. State*, 299 Ga. App. 782, 683 S.E.2d 874 (2009).

Because the defendant was not convicted on the statutory-rape charge but was, instead, found guilty of attempted statutory rape as a lesser-included offense, the issue of whether the trial court erred in denying the defendant’s motion for directed verdict of acquittal as to the statutory-rape charge was moot. *Judice v. State*, 308 Ga. App. 229, 707 S.E.2d 114 (2011).

Defendant’s complaint that the trial court erred in denying the defendant’s

motion for a directed verdict of acquittal as to the offense of forcible rape was rendered moot because the defendant was not found guilty of that offense. *Beaudoin v. State*, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Contesting sufficiency of indictment.

Trial court did not err in denying the defendant’s motion for a directed verdict of acquittal on the ground that there was insufficient evidence that the crimes for which the defendant was charged, aggravated assault, making terroristic threats, and cruelty to children in the third degree, were committed on the date alleged in the indictment because there was sufficient evidence to support the allegations of the indictment; the exact date of the crimes was not a material allegation of the indictment because the exact date was not an essential element with respect to any of the charged offenses, and the date of the crimes proved at trial was prior to the return of the indictment and within the limitation periods for the crimes. *Coats v. State*, 303 Ga. App. 818, 695 S.E.2d 285 (2010).

Cited in *Christian v. State*, 297 Ga. App. 596, 677 S.E.2d 767 (2009); *Williamson v. State*, 308 Ga. App. 473, 708 S.E.2d 57 (2011).

Evidence

Conflicts in evidence.

Trial court did not err in denying the

defendant's motion for a directed verdict of acquittal on the ground that there was insufficient corroboration of an accomplice's testimony because there was no violation of O.C.G.A. § 24-4-8; the testimony of the victim's fiancée and the accomplice's friend was sufficient to corroborate the accomplice's testimony directly identifying the defendant as the shooter, the physical description of the shooter that the fiancée provided to the police fit the defendant, and the fiancée's description of the shooter's clothes was consistent with the accomplice's trial testimony about what the defendant was wearing on the day of the incident. *Johnson v. State*, 288 Ga. 803, 708 S.E.2d 331 (2011).

Directed verdict in juvenile delinquency hearing. — Trial court erred in denying the defendant juvenile's motion for directed verdict as to aggravated assault and aggravated battery on the ground that the evidence established that the defendant was acting in self-defense because the evidence was sufficient for the juvenile court to find that the defendant exceeded any reasonable self-defense when the juvenile followed the victim out of a train and struck the victim. In the Interest of J. W., 306 Ga. App. 339, 702 S.E.2d 649 (2010).

Evidence insufficient to require directed verdict based on entrapment.

Trial court did not err in convicting the defendant of the sale of cocaine and in denying the defendant's motion for a directed verdict of acquittal because the jury was authorized to find that the state's evidence rebutted the defendant's case of entrapment beyond a reasonable doubt since the uncontroverted testimony of the informant and the surveillance recording showed that the defendant had the previously established ability to purchase cocaine from the drug dealer and that the defendant willingly participated in the drug deal; there is no entrapment when the informant merely furnishes an opportunity to a defendant who is ready to commit the offense. *Jackson v. State*, 305 Ga. App. 591, 699 S.E.2d 884 (2010).

Three year and two month delay was fatal. — Trial court abused the court's discretion by denying the defendant's motions for discharge and acquittal

because nothing in the trial court's order showed that the court considered whether the delay before trial was uncommonly long given the circumstances of the case, the pretrial delay of three years and two months greatly exceeded the amount of time necessary to establish a presumption of prejudice, the trial court erred in failing to assign blame for the delay, and the prejudice to the defendant was legally significant; the trial court's finding that the defendant's anxiety was the same as every other defendant awaiting trial was not supported by the evidence because the defendant's anxiety included losing custody of a small child and having the state threaten to take a different child away from the defendant at the time of that child's birth. *Teasley v. State*, 307 Ga. App. 153, 704 S.E.2d 248 (2010).

Evidence did not demand verdict of acquittal.

Evidence was sufficient to support a defendant's conviction for child molestation in violation of O.C.G.A. § 16-6-4(a) and the trial court did not err in denying the defendant's motion for a directed verdict because the jury was entitled to infer from the defendant's act of masturbating in a child's presence that the defendant acted with the intent to arouse or satisfy the defendant's own sexual desires. *Klausen v. State*, 294 Ga. App. 463, 669 S.E.2d 460 (2008).

Trial court did not err in denying a defendant's motion for a directed verdict of acquittal on a charge of attempted burglary in violation of O.C.G.A. §§ 16-4-1 and 16-7-1(a) because the evidence was sufficient to authorize the jury to conclude that the defendant took a substantial step toward entering an owner's apartment to commit a felony; the defendant's inculpatory statement that the defendant intended to enter the owner's apartment to get money was direct evidence of the defendant's guilt, and this statement, combined with a witness's testimony that the witness heard the defendant and the defendant's brother discuss entering the owner's apartment through the window, saw them on the owner's porch, and then heard the window breaking, provided ample evidence to support the defendant's conviction of attempted burglary beyond a

reasonable doubt. *Durham v. State*, 295 Ga. App. 734, 673 S.E.2d 80 (2009).

There was sufficient evidence to support a defendant's convictions on two counts of armed robbery, and the trial court did not err by failing to grant the defendant's motion for a directed verdict, based on both victims' identification of the defendant; the defendant being found in a nearby location to the truck stop where the attacks occurred walking rapidly away; and the defendant being found with exactly the amount of cash taken from one victim. *Burden v. State*, 296 Ga. App. 441, 674 S.E.2d 668 (2009).

Trial court did not err in denying a defendant's motion for a new trial or the defendant's motion for a directed verdict because the evidence was sufficient for the trial court to find the defendant guilty of burglary in violation of O.C.G.A. § 16-7-1(a) beyond a reasonable doubt where the back window of a home was broken and police found the defendant hiding in a closet under a pile of clothing. *Williams v. State*, 297 Ga. App. 723, 678 S.E.2d 95 (2009).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal because the evidence was sufficient to authorize the defendant's convictions for attempted armed robbery, O.C.G.A. § 16-4-1, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), given the victim's eyewitness testimony that the defendant approached the eyewitness with a handgun while attempting to obtain money from the cash register of a store. *Nyane v. State*, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under O.C.G.A. § 24-4-8 and for the jury to find beyond a reasonable doubt that the defendant committed the crimes for which the defendant was convicted; the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator's testimony about

the defendant's participation in the crimes. *Walker v. State*, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Because there was sufficient evidence to support the jury's verdict that the defendant was guilty of criminal damage to property in the second degree, the trial court did not err in denying the defendant's motion for a directed verdict of acquittal; the owner of the truck the defendant damaged testified that the owner paid to have the broken windows repaired and that the owner paid the amount shown on the repair bill, and the bill and photographs of the damages to the vehicle were introduced into evidence. *Elsasser v. State*, 313 Ga. App. 661, 722 S.E.2d 327 (2011).

Application

Directed verdict in aggravated assault cases.

Trial court did not err in denying the defendant's motion for directed verdict of acquittal because there was ample evidence of the defendant's guilt of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(1) based on the defendant's act of firing two shots in the victim's direction, wounding the victim in the chest and leg. *Nyane v. State*, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of aggravated assault with a deadly weapon against a bus driver, O.C.G.A. § 16-5-21(a)(2), because the bus driver testified that the driver did not feel free to drive away since the driver felt the driver's life was in danger; the driver testified that the driver chose not to drive away for fear that the defendant would shoot. *Cannon v. State*, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Directed verdict in aggravated stalking cases.

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) because evidence of the defendant's continuing unauthorized

contacts with the victim and repeated violations of restraining orders established a pattern of harassing behavior; a permanent restraining order had been entered that prohibited the defendant from having any contact with the victim, but the defendant violated that order by sending a letter to the victim that caused the victim to fear for the victim's own family and that of the victim's family. Additionally, a directed verdict was also inappropriate when the evidence authorized the jury to find that venue in Lowndes County was properly established; the victim and the victim's family resided in Lowndes County, and the victim's mother testified that the defendant had sent the letter to their residence and that the letter was retrieved from the mailbox at their residence. *Bowen v. State*, 304 Ga. App. 819, 697 S.E.2d 898 (2010).

Trial court did not err by denying the defendant's motion for a directed verdict because the jury was authorized to find the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a); the victim testified that the defendant had previously threatened the victim, the defendant had a history of violence against the victim, and the defendant made repeated phone calls and sent several text messages to the victim. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012).

Directed verdicts in armed robbery cases.

Trial court did not err in denying the defendant's motion for directed verdict after the defendant was convicted of armed robbery because there was no violation of O.C.G.A. § 24-4-8 since there was evidence from which a jury could find sufficient corroboration of the accomplice's testimony to support the defendant's conviction; the testimony of the victims corroborated the accomplice's testimony because the victims physical description of the perpetrator was consistent with the accomplice's testimony about what the defendant was wearing on the day of the robbery. *Harris v. State*, 311 Ga. App. 336, 715 S.E.2d 757 (2011).

Directed verdict in armed robbery and aggravated assault cases.

Trial court did not err in denying the defendant's motion for directed verdict of

acquittal on the defendant's aggravated assault with intent to rob convictions because the jury was authorized to conclude that the defendant fired a gun at the victims to further a robbery, and the indictment did not charge the defendant with a specific intent to rob the victims but only with a general intent to rob; the defendant approached the victims, pointed a gun toward the head of one of the victims, and demanded money, and after robbing that victim, the defendant fled and fired several shots at the porch where the victims had been standing and at the victims once the victims began chasing the defendant. *Johnson v. State*, 304 Ga. App. 371, 696 S.E.2d 396 (2010).

Directed verdict in burglary cases.

Trial court did not err in denying the defendant's motion for a directed verdict, which was based on the argument that the state's case relied too heavily on allegedly tainted evidence concerning the victims' pretrial identification of burglars, because at the time trial counsel moved for the directed verdict, the allegedly tainted identification evidence had been admitted without objection, and accordingly, the trial court properly considered that evidence in deciding the motion; even in the absence of testimony concerning the victims' pretrial identification of the defendant, there was sufficient evidence to support the defendant's conviction because the defendant and the co-defendant matched the general description of the burglars that the victims gave to police, they were seen walking a short distance from the scene, not long after the burglary occurred, at the time police first saw them, the co-defendant was carrying a backpack stolen during the break-in, when the co-defendant saw police, the co-defendant immediately discarded the backpack, and a number of items stolen during the burglary were recovered from the front porch of the defendant's residence. *Bell v. State*, 306 Ga. App. 853, 703 S.E.2d 680 (2010).

Directed verdict for violating age prohibition for body piercing. — Denial of the defendant's motion for a directed verdict of acquittal was proper, in the defendant's conviction of piercing the body of a person under the age of 18, O.C.G.A. § 16-5-71.1(a), as the defendant

did not verify that an individual was, in fact, 18 years old before the defendant pierced the individual's tongue. At the time, the individual was 17 years old. *Sparks v. State*, 292 Ga. App. 143, 664 S.E.2d 247 (2008).

Directed verdict in child molestation cases.

Trial court did not err in denying the defendant's motion for a directed verdict on the count of an indictment charging the defendant with attempted aggravated child molestation because the defendant was convicted only of the offense of criminal attempt, which was supported by the evidence, and the defendant could be convicted of the lesser-included offense of criminal attempt pursuant to a proper jury instruction. *Arnold v. State*, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal as to the child-molestation count because the evidence was sufficient to support the jury's findings that the defendant committed the offense of child molestation, O.C.G.A. § 16-6-4(a)(1); the jury was authorized to infer that the defendant was kissing the victim on the mouth because the victim testified that they were kissing, and the evidence was sufficient to show that the defendant violated the statute prohibiting child molestation in at least two of the ways alleged in the indictment, which charged the defendant with kissing the victim on the mouth, exposing the defendant's privates to and having intercourse with the victim, who was under 16 years of age, with intent to arouse and satisfy their sexual desires. *Judice v. State*, 308 Ga. App. 229, 707 S.E.2d 114 (2011).

Directed verdict in possession of cocaine with intent to distribute case.

Codefendant's convictions for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and possession with intent to distribute a controlled substance within 1,000 feet of a housing project, O.C.G.A. § 16-13-32.5(b), was unsupported as a matter of law, and the trial court erred by denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence and the reasonable inferences derived there-

from were insufficient to connect the codefendant to the cocaine, which was found in an upstairs bedroom occupied by codefendants; no evidence was introduced to show that the codefendant resided in the apartment where the cocaine was found, which could authorize an inference that the codefendant possessed the property therein. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Directed verdict in trafficking in methamphetamine cases.

Trial court did not err in denying a codefendant's motion for a directed verdict on the charge of trafficking in methamphetamine because based upon the circumstantial evidence presented, the jury was authorized to find that the codefendant was in joint constructive possession of the methamphetamine with the defendant, which was located at the kitchen table where the defendant had been sitting; the defendant lived at the residence with the codefendant, the defendant was present at the time of a controlled buy, and the defendant had access to the drugs that were seized from the kitchen table. *Fyfe v. State*, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

Defendant was not entitled to a directed verdict of acquittal because the jury was authorized to find the defendant guilty of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) beyond a reasonable doubt since the evidence was sufficient to show that the defendant knowingly had the power and intention to exercise dominion and control over the drugs, which were stashed inside a green vehicle; the defendant had moments earlier given an accomplice the keys to the vehicle, told the accomplice where to drive and park the vehicle, and led the accomplice to a motel. *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Trial court erred in denying the codefendant's motion for a directed verdict after the codefendant was convicted of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) because the evidence against the codefendant was insufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the

codefendant was in actual or constructive possession of the drugs found in a vehicle, and there was no presumption of drug possession since there was no evidence that the codefendant owned or controlled the vehicle in which the drugs were found; there was no evidence that the codefendant had even been in or had any connection to that vehicle, no testimony implicated the codefendant in the transaction, and the evidence showed nothing more than the codefendant's presence in the vehicle with the defendant, but there was no evidence that the codefendant had the power and intent to exercise control over the drugs. *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Directed verdict in possession of methamphetamine cases. — Although the defendant contended that the trial court erred by denying the defendant's motion for a directed verdict of acquittal because presence in the vicinity of contraband did not establish possession, the defendant and the co-defendant were indicted and tried together for possession of methamphetamine, the jury was entitled to conclude that the defendant was in possession of the methamphetamine-coated pipe, which was found in the car the defendant drove, next to the driver's seat; moreover, the jury heard the officer's testimony that the defendant stated at arrest that the defendant was aware the item was used to smoke methamphetamine, and the trial court charged the jury on the doctrine of equal access. Thus, the jury was able to contemplate and reject the equal access defense, and sufficient evidence was presented for the jury to find that the defendant possessed the methamphetamine. *Dover v. State*, 307 Ga. App. 126, 704 S.E.2d 235 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal as to the charge of possession of methamphetamine because the trier of fact was presented with sufficient evidence to determine beyond a reasonable doubt that the defendant was guilty of possessing methamphetamine since the court was authorized to conclude that the defendant either dropped or discarded the

methamphetamine during the struggle with police when the defendant fled from a traffic stop; the evidence included the officer's testimony that the officer saw the defendant tuck something into a waistband while in a car, the defendant's flight from law enforcement after being stopped for a minor traffic offense, the proximity of the methamphetamine to the location where the defendant fell to the ground, and the defendant's statement to the officer that the defendant had exchanged drugs for use of the car. *Bone v. State*, 311 Ga. App. 390, 715 S.E.2d 789 (2011).

Directed verdict in issues of delinquency.

Trial court did not err in denying a defendant juvenile's motion for a directed verdict and in adjudicating the defendant delinquent on an obstruction charge because an officer working as a security guard at a restaurant was engaged in the lawful discharge of the officer's official duties at the time of the officer's encounter with the defendant as required by O.C.G.A. § 16-10-24. In the Interest of D.S., 295 Ga. App. 847, 673 S.E.2d 321 (2009).

Directed verdicts in drug cases.

Trial court did not err by denying the defendant's motion for a directed verdict on a charge of felony possession of marijuana. The amount of marijuana was established by a witness's testimony that the defendant returned to the witness's apartment with "about a pound" of marijuana in a grocery bag. *Rosser v. State*, 284 Ga. 335, 667 S.E.2d 62 (2008).

Denial of a motion for mistrial or directed verdict on a possession of marijuana charge based on the state's alleged failure to prove the evidence was marijuana beyond a reasonable doubt was proper. The defendant referred to the substance as marijuana during the defendant's testimony, and this, together with an officer's testimony, was sufficient for the jury to find the defendant guilty of possession of marijuana beyond a reasonable doubt. *Dulcio v. State*, 297 Ga. App. 600, 677 S.E.2d 758 (2009).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of

trafficking in cocaine, O.C.G.A. § 16-13-31(a)(1)(A), and possession of marijuana with intent to distribute, O.C.G.A. § 16-13-30(j), because the verdict was not insupportable as a matter of law; in addition to evidence that the defendant rented a hotel room where illegal drugs were found, had a key to the suite, and was going to the suite at a time when a great quantity and variety of drugs were in open view, there was other evidence linking the defendant to the contraband found there, including the defendant's suspicious behavior upon seeing officers near the suite and the presence of defendant's personal property inside the suite. *Glass v. State*, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal after a jury found the defendant guilty of possession of methamphetamine because the totality of the evidence, although circumstantial, was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt and to reject as speculative and unreasonable the hypothesis that someone else discarded the drugs in a patrol car; the defendant possessed a homemade smoking pipe containing methamphetamine residue, there was similar transaction evidence, and the patrol officer testified that the officer had exclusive control of the officer's patrol car, the officer stayed with the officer's car whenever the car was serviced by third parties, the officer searched the backseat immediately after the defendant exited from the car, and the officer discovered the drugs directly up under the seat where the defendant had been sitting. *Taylor v. State*, 305 Ga. App. 748, 700 S.E.2d 841 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict because the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of distribution of marijuana, O.C.G.A. § 16-13-30(j), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(4); the testimony of a party to the transaction was corroborated by the observations of the detectives, the marijuana taken into evidence,

the written statements of the parties regarding the defendant's involvement, and the defendant's own statement to a detective. *Arnett v. State*, 311 Ga. App. 811, 717 S.E.2d 312 (2011).

Directed verdict in firearm possession cases. — Trial court erred in denying the codefendant's motion for a directed verdict after the codefendant was convicted of possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(5) because the evidence did not support the "during the commission of a felony" element of the firearm possession charge; the evidence against the codefendant was insufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the codefendant was in actual or constructive possession of drugs found in the vehicle in which the codefendant was riding. *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Directed verdict in bus hijacking case. — Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of bus hijacking, O.C.G.A. § 16-12-123(a)(1)(A), because the jury was authorized to conclude beyond a reasonable doubt that the defendant exercised control of the bus by force; the defendant brandished a handgun in the open door of the bus as the defendant ordered a passenger to get off, and the bus driver testified that the driver did not feel free to drive away because the driver felt the driver's life was in danger and the driver did not want to agitate the defendant. *Cannon v. State*, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Directed verdicts in kidnapping cases.

It was not error for the trial court to deny the defendant's motion for a directed verdict of acquittal on the kidnapping charge because during the incident, as the victim exited the defendant's truck, the defendant grabbed the victim by the neck and moved the victim away from the more public area near the truck into a backyard, and after beating the victim in that location, the defendant moved the victim deeper into the backyard toward the tree

line; when the defendant finished beating the victim the defendant picked the victim up and carried the victim to a trailer. The defendant moved the victim away from the area before the defendant began the beating, which was not necessary to the battery and independently increased the victim's danger and prevented the victim from making an escape, calling for help, or being spotted by witnesses. *Amaya v. State*, 308 Ga. App. 460, 708 S.E.2d 28 (2011).

Directed verdict in murder cases.

Trial court did not err in denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence the state presented was sufficient to authorize a rational trier of fact to find the codefendant guilty beyond a reasonable doubt of the malice murder of a girlfriend's child; both the girlfriend and the codefendant were with the child during the time period within which the fatal injuries were believed to have been inflicted upon the child. *Smith v. State*, 290 Ga. 428, 721 S.E.2d 892 (2012).

Directed verdict in driving under a suspended license case. — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal under O.C.G.A. § 17-9-1 after a jury found the defendant guilty of driving on a suspended license in violation of O.C.G.A. § 40-5-121(a) because there was some evidence that the defendant was served with a notice of suspension pursuant to O.C.G.A. § 40-5-60; the state introduced the defendant's driver's license history report, which showed that the defendant had been served with the notice of the license suspension by a police officer, and the officer testified that the officer served the defendant with the notice. *Sledge v. State*, 312 Ga. App. 97, 717 S.E.2d 682 (2011).

Directed verdict in theft by taking case.

Trial court did not err in denying the defendant's motion for a directed verdict because the evidence was sufficient for a rational trier of fact to infer that the defendant acted with criminal intent and to find the defendant guilty of theft by taking in violation of O.C.G.A. § 16-8-2, and whether the defendant intended to

deprive the victims of their property was a question for the trier of fact, who was not required to believe the defendant's testimony; the manner in which the property was appropriated was irrelevant, and even if the trial court had accepted the defendant's claim that the defendant lawfully appropriated the trailer, the evidence supported a finding that although the defendant could have had lawful possession of the truck initially, the defendant failed to return the truck, or even provide the victims with the location of the truck upon their demands. *Rushing v. State*, 305 Ga. App. 629, 700 S.E.2d 620 (2010).

Directed verdict in possession of tools for crime cases.

Trial court erred in denying the defendant's motion for directed verdict of acquittal because the evidence was insufficient to support the defendant's conviction for possession of tools for the commission of a crime for lack of evidence showing that body armor was a tool commonly used in the commission of attempted armed robbery pursuant to O.C.G.A. § 16-7-20(a). *Nyane v. State*, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Directed verdict in voluntary manslaughter cases.

Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of defense of habitation, O.C.G.A. § 16-3-23, because the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to find that the defendant's stabbing of the victim was not justified in defense of the defendant's habitation; the jury was authorized to rely upon the defendant's prior inconsistent statement to the defendant's relative to conclude that the victim's entry into the defendant's apartment was not "violent and tumultuous," and based upon the eyewitness testimony of a neighbor, the jury also was authorized to find that the victim was unarmed and that deadly force was not necessary for the defendant's protection.

Muckle v. State, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

Direct verdict in racketeering crime offenses. — Trial court properly denied a defendant's motion for a directed verdict with regard to the racketeering charges brought against the defendant for which the defendant was convicted of as the activities that the defendant engaged in involving various codefendants, the abduction of a store manager, and the victim's murder, were sufficiently linked to form a racketeering pattern, but sufficiently distinguishable so that they were not mere single transactions. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Trial court did not err in denying motion for directed verdict.

Trial court did not err when the court denied the defendant's motion to dismiss based on a purported violation of the defendant's constitutional right to a speedy trial because the circumstances of the case warranted a finding that the twelve-month, ten-day delay between the defendant's indictment and the filing of defendant's motion to dismiss was not presumptively prejudicial. The defendant was serving a sentence on an unrelated charge in Mississippi when the indictment was returned, a requisition warrant had to be obtained from the Mississippi governor, which process was initiated within a month of the defendant's indictment and took three months before the warrant was issued, and the defendant was brought to Georgia two months after the warrant issued and was arraigned approximately two months later. *Rogers v. State*, 286 Ga. 387, 688 S.E.2d 344 (2010).

Trial court properly denied a defendant's motion under O.C.G.A. § 17-9-1(a) for an acquittal in the defendant's trial for aiding and abetting a housemate in committing acts of aggravated child molestation against the defendant's children, because there was ample evidence that the defendant acquiesced in and encouraged the acts of child molestation by forcing the children to sleep in the same room with the housemate, although the children objected. *Valentine v. State*, 301 Ga. App. 630, 689 S.E.2d 76 (2009).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal after a jury convicted the defendant of two counts of cruelty to children in violation of O.C.G.A. § 16-5-70(b) because the state did not fail to prove that the defendant used a bat and a belt as stated in the indictment; both victims, who were the defendant's adopted children, testified that the defendant beat the victims with a belt and a bat and that the beatings occurred when the victims did not complete the exercises that the defendant required the victims to do on a daily basis. *Dinkler v. State*, 305 Ga. App. 444, 699 S.E.2d 541 (2010).

Superior court did not abuse the court's discretion in denying the defendant's motion for discharge and acquittal because the defendant's right to a speedy trial was not violated; the defendant did not assert the right until the defendant filed the motion, which was approximately 48 months from the time of the indictment, the defendant did not maintain that the defendant suffered any extraordinary anxiety or concern due to the delay in trial, and the defendant made no challenge to the finding of the defense's failure to show diligence in attempting to locate witnesses, i.e., that the witnesses were unavailable to the defendant. *Williams v. State*, 290 Ga. 24, 717 S.E.2d 640 (2011).

Directed verdict in financial transaction card theft case. — Trial court did not err in denying the defendant's motion for a directed verdict on the charge of financial transaction card theft because the victim was in constructive possession of the victim's credit card, which was sufficient to establish the allegation set forth in the accusation; because the victim was the cardholder on the account, the victim had the authority to exercise dominion and control over the credit card that had been issued in the victim's name. *Amaechi v. State*, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

Practice and Procedure

Venue properly established. — Trial court did not err in denying the defendant's motion for directed verdict of acquittal after a jury convicted the defendant of two counts of cruelty to children in

violation of O.C.G.A. § 16-5-70(b) because venue was properly established by the state; one of the victims testified that the victim and the victim's sister lived about three blocks from the courthouse in which the trial was held, and the defendant testified that the defendant had been living in the same home for 14 years and that the defendant and defendant's spouse had attempted to adopt in the county where the trial was held. *Dinkler v. State*, 305 Ga. App. 444, 699 S.E.2d 541 (2010).

Trial court did not err in denying the defendant's motion for directed verdict because the testimony, taken as a whole, was sufficient evidence from which the jury could conclude beyond a reasonable doubt that the child molestation was committed in Fayette County; during trial and the victim's forensic interview, the victim

described that the molestation incident occurred during a visit to the victim's aunt's residence, which was located in Fayette County, Georgia, and two detectives testified that the referenced visit and molestation incident took place at a residence in Fayette County. *Hargrave v. State*, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Trial court erred in granting the defendant's motion for directed verdict after the judgment of conviction had been entered because the trial court's reservation of a ruling upon the motion was entered after the trial court imposed sentencing and entered its judgment of conviction; therefore, the decision on the motion came too late and was procedurally barred. *State v. Canup*, 300 Ga. App. 678, 686 S.E.2d 275 (2009).

RESEARCH REFERENCES

ALR. — Prejudicial effect of juror misconduct arising from internet usage, 48 ALR6th 135.

17-9-2. Jury to judge law and facts and give general verdict; imposition of sentence; form and construction of verdicts.

JUDICIAL DECISIONS

ANALYSIS

PRACTICE AND PROCEDURE

Practice and Procedure

Requirements of jury communications after deliberations have started. — In an exercise of the court's inherent power to maintain a court system capable of providing for the administration of justice in an orderly and efficient manner, trial courts should be required to have jurors' communications submitted to the court in writing; to mark the written communication as a court exhibit in the presence of counsel; to afford counsel a full opportunity to suggest an appropriate response; and to make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications

counsel deems appropriate before the jury is exposed to the instruction. *Lowery v. State*, 282 Ga. 68, 646 S.E.2d 67 (2007), cert. denied, U.S. , 128 S. Ct. 508, 169 L. Ed. 2d 355 (2007).

Involuntary manslaughter verdict not inconsistent with felony murder/cruelty to children verdict. — In a shaken baby death, an involuntary manslaughter verdict was not mutually exclusive of a guilty verdict for felony murder/cruelty to children because, consistent with the jury's guilty verdict on the felony murder charge, an offense requiring criminal intent, the jury predicated the jury's involuntary manslaughter verdict on a misdemeanor involving criminal intent, battery, or simple battery under O.C.G.A.

§§ 16-5-23(a) and 16-5-23.1(a), although the jury was also instructed on reckless conduct, a misdemeanor committed by criminal negligence, O.C.G.A. § 16-5-60(b). *Drake v. State*, 288 Ga. 131, 702 S.E.2d 161 (2010).

17-9-4. Validity of judgment rendered by court having no jurisdiction of person or subject matter.

JUDICIAL DECISIONS

Court had no jurisdiction to amend defendant's sentence two years after it was imposed. — A trial court erred by denying defendant's motion to vacate defendant's amended sentence on drug-related charges as the trial court had no jurisdiction to amend defendant's sentence since, at the time it was undertaken, over two years had passed since the sentence was originally pronounced; thus, under O.C.G.A. § 17-10-1(f), there was no jurisdiction to amend the sentence. *Hall v. State*, 291 Ga. App. 649, 662 S.E.2d 753 (2008).

Motion to vacate does not lie in criminal case.

Petitioner's motion to vacate the conviction

was not an appropriate remedy in a criminal case after petitioner's murder conviction had been affirmed on direct appeal. The court overruled Division 2 of *Chester v. State*, 284 Ga. 162 (2008), which had allowed such motions under O.C.G.A. § 17-9-4, and held that in order to challenge a conviction after it had been affirmed on direct appeal, petitioner was required to file an extraordinary motion for new trial, O.C.G.A. § 5-5-41, a motion in arrest of judgment, O.C.G.A. § 17-9-61, or a petition for habeas corpus under O.C.G.A. § 9-14-40. *Harper v. State*, 286 Ga. 216, 686 S.E.2d 786 (2009).

Cited in *McKenzie v. State*, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

ARTICLE 2

RENDITION AND RECEIPT OF VERDICT

17-9-20. (Effective January 1, 2013. See note.) Action by juror on private knowledge as to facts, witnesses, or parties.

A juror shall not act on his or her private knowledge respecting the facts, witnesses, or parties. (Civil Code 1895, § 5337; Civil Code 1910, § 5932; Code 1933, § 110-108; Ga. L. 2011, p. 99, § 32/HB 24.)

The 2011 amendment, effective January 1, 2013, inserted "or her" in the middle and deleted "unless he is sworn and examined as a witness in the case" following "parties" at the end. See editor's note for applicability.

Editor's notes. — This Code section, as set forth above, is effective on January 1, 2013. For the version of this Code section effective until that date, see the bound volume.

Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 3

AMENDMENT AND IMPEACHMENT OF VERDICT

17-9-41. (Repealed effective January 1, 2013) Use of affidavits of jurors relating to verdict.

Editor's notes. — Ga. L. 2011, p. 99, § 33 provides for the repeal of this Code section effective January 1, 2013. For provisions of this Code section effective until that date, see the bound volume.

Ga. L. 2011, p. 99, § 101, not codified by

the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

JUDICIAL DECISIONS

ANALYSIS

STATEMENTS BY JURORS
PRACTICE AND PROCEDURE**Statements by Jurors****Improper communication with deputy sheriff or bailiff.**

Inmate's 28 U.S.C. § 2254 habeas petition challenging a death sentence was improperly denied because an improper bailiff-jury communication during the penalty phase violated the inmate's Sixth Amendment right to a fair trial and defendant's Fourteenth Amendment due process right to have the jury decide the punishment based on the evidence presented in court, in accordance with the rules and instructions of the court and with the full knowledge of the parties. The state habeas court erroneously determined that the affidavits of three jurors were inadmissible under O.C.G.A. § 17-9-41 after ruling that a bailiff's comments to a juror concerning a defendant's parole eligibility constituted an exception to § 17-9-41's rule prohibiting the use of jurors' affidavits to impeach their verdict; the inmate was actually prejudiced by the improper bailiff-jury communication because the jurors indicated that the jurors imposed the death sentence based on the bailiff's communication to the jurors that life without parole was not a sentencing option. *Ward v. Hall*, 592 F.3d 1144 (11th Cir.), cert. denied, U.S. , 131 S. Ct. 647; 178 L. Ed. 2d 513 (2010).

No misconduct established. — With regard to a defendant's convictions for

incest and child molestation, the defendant was not denied a fair trial when allegedly extrajudicial evidence was introduced to the jury through juror misconduct about the requirement upon a school teacher to report abuse as the defendant not only failed to establish that the verdict lacked due process, the defendant neglected to show that any statement by the juror in question amounted to misconduct as the only juror who arguably alleged improper conduct admitted that the juror could barely hear the statement in question and could not remember what it was. *Hubert v. State*, 297 Ga. App. 71, 676 S.E.2d 436 (2009).

Practice and Procedure

Trial court properly declined to consider affidavit. — With regard to a defendant's murder conviction, the trial court did not abuse the court's discretion by declining to consider a juror affidavit in ruling on the defendant's motion for new trial, which alleged that the jury was ready to acquit the defendant until one of the jurors reported seeing the defendant driving in the same vehicle that was alleged to have been involved in the murder as well as was seen responding to a nickname of "Blood" in the hallway of the courthouse, which was the name the victim's sibling indicated was used by defendant. The trial court properly determined

that the affidavit contained significant credibility issues and that it was fatal that the defense did not have the affiant testify in open court where the state could cross-examine the affiant so that the affi-

ant's credibility could be more readily and definitely evaluated by the trial court. *Henley v. State*, 285 Ga. 500, 678 S.E.2d 884, cert. denied, 130 S. Ct. 800, 175 L. Ed. 2d 559, 2009 U.S. LEXIS 8805 (2009).

RESEARCH REFERENCES

ALR. — Prejudicial effect of juror misconduct arising from internet usage, 48 ALR6th 135.

ARTICLE 4

MOTIONS IN ARREST

17-9-60. Jurisdiction of motion; notification of opposing party.

JUDICIAL DECISIONS

Service on state not required before term of court expired. — Trial court erred in dismissing defendant's motion to withdraw a guilty plea, which was filed by letter before the term of court expired but not served on the state, because the state had reasonable notice of the motion to withdraw 18 days before it was first set for a hearing, and over two

years before the hearing was eventually held. The court looked to O.C.G.A. § 17-9-60 for guidance as to whether the state was required to be served with the motion prior to the expiration of the term of court, and concluded that it was not. *McKiernan v. State*, 286 Ga. 756, 692 S.E.2d 340 (2010).

17-9-61. Time and grounds for motion generally.

JUDICIAL DECISIONS

Challenge to enhanced sentence based on allegedly defective indictment. — Defendant could not challenge a sentence for family violence battery on appeal, claiming that the sentence was erroneously enhanced from a misdemeanor to a felony under O.C.G.A. § 16-5-23.1(f)(2) based on a previous conviction arising from a guilty plea to the same offense that was based on a defective indictment, because since the defendant failed to challenge the indictment at the time the defendant pleaded guilty, the proper remedy was a motion in arrest of judgment under O.C.G.A. § 17-9-61(b) or habeas corpus. *Grogan v. State*, 297 Ga. App. 251, 676 S.E.2d 764 (2009).

After defendant's conviction has been affirmed on appeal, motion in arrest of judgment is one of three

available remedies. — Petitioner's motion to vacate the conviction was not an appropriate remedy in a criminal case after petitioner's murder conviction had been affirmed on direct appeal. The court overruled Division 2 of *Chester v. State*, 284 Ga. 162 (2008), which had allowed such motions under O.C.G.A. § 17-9-4, and held that in order to challenge a conviction after it had been affirmed on direct appeal, petitioner was required to file an extraordinary motion for new trial, O.C.G.A. § 5-5-41, a motion in arrest of judgment, O.C.G.A. § 17-9-61, or a petition for habeas corpus under O.C.G.A. § 9-14-40. *Harper v. State*, 286 Ga. 216, 686 S.E.2d 786 (2009).

Time of motions.

Defendant waived defendant's right to be tried under a perfect indictment be-

cause the defendant did not file a special demurrer within 10 days after the arraignment as required by O.C.G.A. § 17-7-110. Additionally, to the extent defendant's motion was one in arrest of judgment, the motion was untimely because the motion was not filed in the same term of court as the judgment as required by O.C.G.A. § 17-9-61. *Thompson v. State*, 286 Ga. 889, 692 S.E.2d 379 (2010), overruled on other grounds, *State v. Kelly*, 290 Ga. 29, 718 S.E.2d 232 (2011).

Because the defendant did not file a timely special demurrer to the indictment or a timely motion in arrest of judgment, the defendant waived any claim that could

have been raised via special or general demurrer. *Kirt v. State*, 309 Ga. App. 227, 709 S.E.2d 840 (2011).

Preservation for appellate review.

— Because the defendant's motion in arrest of judgment was untimely under O.C.G.A. § 17-9-61(b), in that the motion was filed over five years after judgment was entered, the denial of the motion by the trial court was not subject to appellate review. *Myers v. State*, 311 Ga. App. 668, 716 S.E.2d 772 (2011).

Cited in *Dasher v. State*, 285 Ga. 308, 676 S.E.2d 181 (2009); *McDaniel v. State*, 298 Ga. App. 558, 680 S.E.2d 593 (2009).

CHAPTER 10

SENTENCE AND PUNISHMENT

Article 1

Procedure for Sentencing and Imposition of Punishment

Sec.

- 17-10-1. Fixing of sentence; suspension or probation of sentence; change in sentence; eligibility for parole; prohibited modifications; exceptions.
- 17-10-1.2. Oral victim impact statement; presentation of evidence; cross-examination and rebuttal by defendant; effect of non-compliance; no creation of cause of action or right of appeal.
- 17-10-2. Conduct of presentence hearings in felony cases; effect of reversal for error in presentence hearing.
- 17-10-6.1. Punishment for serious violent offenders.
- 17-10-7. Punishment of repeat offenders; punishment and eligibility for parole of persons convicted of fourth felony offense.
- 17-10-9.1. Voluntary surrender to county jail or correctional institution; release of defendant.

Sec.

- 17-10-11. Credit for time in confinement awaiting trial or resulting from a court order — Granting generally; use in determining parole eligibility; applicability of Code section.
- 17-10-15. AIDS transmitting crimes; requiring defendant to submit to HIV test; report of results.
- 17-10-16.1. Seeking death penalty not prerequisite to life without parole sentence.

Article 2

Death Penalty Generally

- 17-10-30. Procedure for imposition of death penalty generally.
- 17-10-30.1. Imprisonment for life without parole; finding of statutory aggravating circumstance required; duties of judge and jury [Repealed].
- 17-10-31. Requirement of jury finding of aggravating circumstance and recommendation of death penalty prior to imposition; arguments of counsel during sentencing phase; jury instructions; actions of judge in

Sec.

event of failure to reach unanimous verdict.

17-10-31.1. Requirement of jury finding of aggravating circumstance and recommendation of sentence of death or life without parole; duties of judge; jury instruction on meaning of "life without parole" and "life imprisonment." [Repealed].

17-10-32.1. Sentencing of person subject to death penalty or life without parole upon plea of guilty; duties of judge [Repealed].

Sec.

17-10-35.1. Review of pretrial proceedings in cases in which death penalty is sought; reports investigating reversible error; transmittal of reports to Supreme Court; orders regarding review; Attorney General assistance; res judicata; applicability; waiver of rights.

17-10-37. Appointment of assistant to Supreme Court to review death sentences; employment of staff to compile data.

Law reviews. — For note, "Comparative Analysis of Democracy and Sentencing in the United States as a Model for

Reform in Iraq," see 33 Ga. J. Int'l & Comp. L. 303 (2004).

ARTICLE 1

PROCEDURE FOR SENTENCING AND IMPOSITION OF PUNISHMENT

17-10-1. Fixing of sentence; suspension or probation of sentence; change in sentence; eligibility for parole; prohibited modifications; exceptions.

(a)(1) Except in cases in which life imprisonment, life without parole, or the death penalty may be imposed, upon a verdict or plea of guilty in any case involving a misdemeanor or felony, and after a presentence hearing, the judge fixing the sentence shall prescribe a determinate sentence for a specific number of months or years which shall be within the minimum and maximum sentences prescribed by law as the punishment for the crime. The judge imposing the sentence is granted power and authority to suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper, including service of a probated sentence in the sentencing options system, as provided by Article 9 of Chapter 8 of Title 42, and including the authority to revoke the suspension or probation when the defendant has violated any of the rules and regulations prescribed by the court, even before the probationary period has begun, subject to the conditions set out in this subsection; provided, however, that such action shall be subject to the provisions of Code Sections 17-10-6.1 and 17-10-6.2.

(2) Active probation supervision shall terminate in all cases no later than two years from the commencement of active probation

supervision unless specially extended or reinstated by the sentencing court upon notice and hearing and for good cause shown; provided, however, that in those cases involving the collection of fines, restitution, or other funds, the period of active probation supervision shall remain in effect for so long as any such obligation is outstanding, or until termination of the sentence, whichever first occurs, and for those cases involving a conviction under the "Georgia Street Gang Terrorism and Prevention Act," the period of active probation supervision shall remain in effect until the termination of the sentence, but shall not exceed five years unless as otherwise provided in this paragraph. Active probation supervision shall not be required for defendants sentenced to probation while the defendant is in the legal custody of the Department of Corrections or the State Board of Pardons and Paroles. As used in this paragraph, the term "active probation supervision" shall have the same meaning as the term "active supervision" as set forth in Code Section 42-1-1.

(3)(A) Any part of a sentence of probation revoked for a violation other than a subsequent commission of any felony, a violation of a special condition, or a misdemeanor offense involving physical violence resulting in bodily injury to an innocent victim which in the opinion of the trial court constitutes a danger to the community or a serious infraction occurring while the defendant is assigned to an alternative probation confinement facility shall be served in a probation detention center, probation boot camp, diversion center, weekend lock up, or confinement in a local jail or detention facility, or other community correctional alternatives available to the court or provided by the Department of Corrections.

(B) A parolee or probationer charged with a misdemeanor involving physical injury or an attempt to commit physical injury or terroristic threats or with a new felony shall not be entitled to bond pending a hearing on the revocation of his or her parole or probation, except by order of a judge of the superior, state, or magistrate court wherein the alleged new offense occurred after a hearing and upon determination of the superior, state, or magistrate court that the parolee or probationer does not constitute a threat to the community; provided, however, that this subparagraph does not authorize state or magistrate court judges to grant bail for a person charged with any offense listed in subsection (a) of Code Section 17-6-1.

(4) In cases of imprisonment followed by probation, the sentence shall specifically provide that the period of probation shall not begin until the defendant has completed service of the confinement portion of the sentence. No revocation of any part of a probated sentence shall be effective while a defendant is in the legal custody of the State Board of Pardons and Paroles.

(5)(A) Where a defendant has been sentenced to probation, the court shall retain jurisdiction throughout the period of the probated sentence as provided for in subsection (g) of Code Section 42-8-34. Without limiting the generality of the foregoing, the court may shorten the period of active probation supervision or administrative probation supervision on motion of the defendant or on its own motion, or upon the request of a probation supervisor, if the court determines that probation is no longer necessary or appropriate for the ends of justice, the protection of society, and the rehabilitation of the defendant. Prior to entering any order for shortening a period of probation, the court shall afford notice to the victim or victims of all sex related offenses or violent offenses resulting in serious bodily injury or death and, upon request of the victim or victims so notified, shall afford notice and an opportunity for hearing to the defendant and the prosecuting attorney.

(B) The Department of Corrections shall establish a form document which shall include the elements set forth in this Code section concerning notification of victims and shall make copies of such form available to prosecuting attorneys in this state. When requested by the victim, the form document shall be provided to the victim by the prosecuting attorney. The form shall include the address of the probation office having jurisdiction over the case and contain a statement that the victim must maintain a copy of his or her address with the probation office and must notify the office of any change of address in order to maintain eligibility for notification by the Department of Corrections as required in this Code section.

(C) As used in this paragraph, the terms “active probation supervision” and “administrative probation supervision” shall have the same meanings as the terms “active supervision” and “administrative supervision,” respectively, as set forth in Code Section 42-1-1.

(6)(A) Except as otherwise authorized by law, no court shall modify, suspend, probate, or alter a previously imposed sentence so as to reduce or eliminate a period of incarceration or probation and impose a financial payment which:

(i) Exceeds the statutorily specified maximum fine, plus all penalties, fees, surcharges, and restitution permitted or authorized by law; or

(ii) Is to be made to an entity which is not authorized by law to receive fines, penalties, fees, surcharges, or restitution.

(B) The prohibitions contained in this paragraph shall apply regardless of whether a defendant consents to the modification,

suspension, probation, or alteration of such defendant's sentence and the imposition of such payment.

(C) Nothing in this paragraph shall prohibit or prevent a court from requiring, as a condition of suspension, modification, or probation of a sentence in a criminal case involving child abandonment, that the defendant pay all or a portion of child support which is owed to the custodial parent of a child which is the subject of such case.

(b) The judge, in fixing the sentence as prescribed in subsection (a) of this Code section, may make a determination as to whether the person being sentenced should be considered for parole prior to the completion of any requirement otherwise imposed by law relating to the completion of service of any specified time period before parole eligibility. In the event that the judge so determines, he may specify in the sentence that the person is sentenced under this subsection and may provide that the State Board of Pardons and Paroles, acting in its sole discretion, may consider and may parole any person so sentenced at any time prior to the completion of any minimum requirement otherwise imposed by law, rule, or regulation for the service of sentences or portions thereof. The determination allowed in this subsection shall be applicable to first offenders only.

(c) In any case in which a minor defendant who has not achieved a high school diploma or the equivalent is placed under a probated or suspended sentence, the court may require as a condition of probation or suspension of sentence that the defendant pursue a course of study designed to lead to achieving a high school diploma or the equivalent; and, in any case in which such a condition of probation may be imposed, the court shall give express consideration to whether such a condition should be imposed.

(d) In any case involving a misdemeanor or a felony in which the defendant has been punished in whole or in part by a fine, the sentencing judge shall be authorized to allow the defendant to satisfy such fine through community service as defined in paragraph (2) of Code Section 42-8-70. One hour of community service shall equal the dollar amount of one hour of paid labor at the minimum wage under the federal Fair Labor Standards Act of 1938, as now or hereafter amended, unless otherwise specified by the sentencing judge. A defendant shall be required to serve the number of hours in community service which equals the number derived by dividing the amount of the fine by the federal minimum hourly wage or by the amount specified by the sentencing judge. Prior to or subsequent to sentencing, a defendant may request the court that all or any portion of a fine may be satisfied under this subsection.

(e) In any case involving a felony in which the defendant previously appeared before a juvenile court, the records of the dispositions of the

defendant as well as any evidence used in any juvenile court hearing shall be available to the district attorney, the defendant, and the superior court judge in determining sentencing as provided in Code Section 15-11-79.1.

(f) Within one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment after direct appeal, whichever is later, the court imposing the sentence has the jurisdiction, power, and authority to correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed. Prior to entering any order correcting, reducing, or modifying any sentence, the court shall afford notice and an opportunity for a hearing to the prosecuting attorney. Any order modifying a sentence which is entered without notice and an opportunity for a hearing as provided in this subsection shall be void. This subsection shall not limit any other jurisdiction granted to the court in this Code section or as provided for in subsection (g) of Code Section 42-8-34.

(g)(1)(A) In sentencing a defendant convicted of a felony to probated confinement, the sentencing judge may make the defendant's participation in a work release program operated by a county a condition of probation, provided that such program is available and the administrator of such program accepts the inmate.

(B) Any defendant accepted into a county work release program shall thereby be transferred into the legal custody of the administrator of said program; likewise, any defendant not accepted shall remain in the legal custody of the Department of Corrections.

(2) Work release status granted by the court may be revoked for cause by the sentencing court in its discretion or may be revoked by the state or local authority operating the work release program for any reason for which work release status would otherwise be revoked.

(3) The provisions of this subsection shall not limit the authority of the commissioner to authorize work release status pursuant to Code Section 42-5-59 or apply to or affect the authority to authorize work release of county prisoners, which shall be as provided for in Code Sections 42-1-4 and 42-1-9 or as otherwise provided by law.

(4) This subsection shall not apply with respect to any violent felony or any offense for which the work release status is specifically prohibited by law, including but not limited to serious violent felonies as specified in Code Section 17-10-6.1. (Ga. L. 1919, p. 387, § 1; Code 1933, § 27-2502; Ga. L. 1950, p. 352, § 3; Ga. L. 1964, p. 483, §§ 2, 4; Ga. L. 1974, p. 352, §§ 3, 4; Ga. L. 1981, p. 1024, § 1; Ga. L. 1982, p. 3, § 17; Ga. L. 1984, p. 894, § 2; Ga. L. 1986, p. 842, § 1; Ga. L.

1988, p. 463, § 1; Ga. L. 1991, p. 310, § 1; Ga. L. 1992, p. 3221, § 1; Ga. L. 1993, p. 1654, § 1; Ga. L. 1994, p. 1959, § 9; Ga. L. 1995, p. 1043, § 1; Ga. L. 1996, p. 1257, § 1; Ga. L. 1998, p. 842, § 6; Ga. L. 2000, p. 20, § 7; Ga. L. 2001, p. 94, § 5; Ga. L. 2001, p. 1030, § 1; Ga. L. 2004, p. 775, § 1; Ga. L. 2005, p. 60, § 17/HB 95; Ga. L. 2006, p. 379, § 19/HB 1059; Ga. L. 2006, p. 710, § 7/SB 203; Ga. L. 2010, p. 230, § 10/HB 1015; Ga. L. 2012, p. 899, § 4-3/HB 1176.)

The 2010 amendment, effective July 1, 2010, in the first sentence of paragraph (a)(2), inserted “that” near the middle and added “, and for those cases involving a conviction under the ‘Georgia Street Gang Terrorism and Prevention Act,’ the period of supervision shall remain in effect until the termination of the sentence, but shall not exceed five years unless as otherwise provided in this paragraph” at the end.

The 2012 amendment, effective July 1, 2012, in paragraph (a)(2), twice substituted “Active probation” for “Probation”, twice inserted “active probation”, inserted “active”, and added the last sentence; in subparagraph (a)(5)(A), substituted “active probation supervision or administrative probation supervision on motion of the defendant or on its own motion, or upon the request of a probation supervisor,” for “probation on motion of the defen-

dant or on its own motion.”; and added subparagraph (a)(5)(C). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SENTENCING PREROGATIVES OF TRIAL COURT MODIFICATION OF SENTENCE

General Consideration

O.C.G.A. § 17-10-1 does not apply, etc.

Defendant’s sentence of 30 years without parole for trafficking in cocaine was a sentence allowed under O.C.G.A. § 16-13-30(d), and hence, not illegal or void. Defendant could not have been sentenced under O.C.G.A. § 17-10-7(a), or the defendant’s sentence would have been 40 years. Because the sentence was not void, it was not subject to modification under O.C.G.A. § 17-10-1(f). *State v. Blue*, 304 Ga. App. 471, 696 S.E.2d 692 (2010).

O.C.G.A. § 17-10-1 did not govern

motion to withdraw guilty plea after sentence. — Trial court erred in dismissing defendant’s motion to withdraw a guilty plea, which was filed by letter before the term of court expired but not served on the state, because the state had reasonable notice of the motion to withdraw 18 days before it was first set for a hearing, and over two years before the hearing was eventually held. The court looked to O.C.G.A. § 17-9-60 for guidance as to whether the state was required to be served with the motion prior to the expiration of the term of court, and concluded that it was not. *McKiernan v. State*, 286 Ga. 756, 692 S.E.2d 340 (2010).

Motion to vacate sentence was untimely filed.

Appeal of a trial court's denial of a defendant's motion to correct sentence was dismissed because the motion was filed beyond the time specified in O.C.G.A. § 17-10-1(f), the sentence was within the applicable penalty range, and the sentence was not void despite the defendant's claim that the prosecution introduced erroneous and inflammatory information at the sentencing hearing; further, the sentence was not "enhanced" beyond the maximum penalty and Apprendi did not apply. *Burg v. State*, 297 Ga. App. 118, 676 S.E.2d 465 (2009), cert. denied, No. S09C1217, 2009 Ga. LEXIS 419 (Ga. 2009).

Cited in *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010); *Shelton v. State*, 307 Ga. App. 599, 705 S.E.2d 699 (2011); *Stephens v. State*, 289 Ga. 758, 716 S.E.2d 154 (2011).

Sentencing Prerogatives of Trial Court

Correction of written sentence to conform to oral pronouncement. —

Trial court did not err by correcting the court's written sentence to conform with the court's oral pronouncement because the trial court was authorized to correct the clerical error appearing in the court's written sentence as compared to the court's original oral pronouncement; the trial court, after reviewing the original transcript, determined that the court's original pronouncement and intent was for the aggravated battery and burglary counts to be served consecutive to each other as well as to the other aggravated battery count. *Griggs v. State*, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Imposition of life sentence, etc.

Trial court correctly sentenced a defendant to serve life without the possibility of parole because the defendant was a four-time recidivist and the maximum sentence for rape was life in prison. Further, the state provided the defendant with notice prior to trial that it would seek to have the defendant sentenced as a recidivist, pursuant to O.C.G.A. § 17-10-7. *Hall v. State*, 292 Ga. App. 544, 664 S.E.2d 882 (2008), cert. denied, No.

S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

Consecutive sentences affirmed.

Nothing in the record affirmatively indicated that a trial court erroneously believed that the court had no discretion under O.C.G.A. § 17-10-1(a)(1) to suspend or probate a defendant's mandatory consecutive five-year sentence on a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b); thus, the sentence was properly imposed consecutively to the defendant's sentence for trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1). *Weems v. State*, 295 Ga. App. 680, 673 S.E.2d 50 (2009).

It could not be assumed that the trial court relied on the defendant's prior convictions in sentencing the defendant because although the trial court imposed maximum and consecutive sentences for the defendant's convictions, the record did not indicate that the trial court relied on the prior convictions in any way, and the trial court had the authority to enter those sentences regardless of any prior convictions pursuant to O.C.G.A. §§ 17-10-1(a)(1) and 17-10-10(a). *Hampton v. State*, 289 Ga. 621, 713 S.E.2d 851 (2011).

No error in imposing maximum and consecutive sentences. —

It could not be assumed that the trial court relied on the defendant's prior convictions in sentencing the defendant because although the trial court imposed maximum and consecutive sentences for the defendant's convictions, the record did not indicate that the trial court relied on the prior convictions in any way, and the trial court had the authority to enter those sentences regardless of any prior convictions pursuant to O.C.G.A. §§ 17-10-1(a)(1) and 17-10-10(a). *Hampton v. State*, 289 Ga. 621, 713 S.E.2d 851 (2011).

Probation and suspended sentences traditional rehabilitative measures.

Trial court, pursuant to O.C.G.A. § 17-10-1(a)(1), has authority to suspend or probate all or any part of the entire sentence. *Kaylor v. State*, 312 Ga. App. 633, 719 S.E.2d 530 (2011).

Good cause shown for extended period of supervised probation. — Trial

court did not err in sentencing the defendant to more than two years' supervised probation after a jury convicted the defendant of child molestation because the defendant's sentence to an extended period of supervised probation was pronounced after notice and hearing and for good cause shown, as required by O.C.G.A. § 17-10-1(a)(2); the "good cause shown" was to protect children. *O'Neal v. State*, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

Modification of Sentence

When sentence may be amended.

The trial court erred in holding that because the term of court in which a defendant's sentence was imposed had expired, it lacked jurisdiction to modify the sentence. Under O.C.G.A. § 17-10-1(f), the trial court had jurisdiction to rule upon the merits of the motion within the 120-day period following the court's receipt of a remittitur from a prior appeal. *Davis v. State*, 291 Ga. App. 252, 661 S.E.2d 872 (2008).

A trial court erred by denying defendant's motion to vacate defendant's amended sentence on drug-related charges as the trial court had no jurisdiction to amend defendant's sentence since, at the time it was undertaken, over two years had passed since the sentence was originally pronounced; thus, under O.C.G.A. § 17-10-1(f), there was no jurisdiction to amend the sentence. *Hall v. State*, 291 Ga. App. 649, 662 S.E.2d 753 (2008).

Judge can modify if sentence void.

Because O.C.G.A. § 16-13-31(f)(1) required a mandatory minimum sentence for trafficking in methamphetamine of ten years and a \$200,000 fine, and the sentence imposed by the trial court failed to include the fine, the trial court's resentencing to add the fine after defendant began serving the sentence was valid and did not violate defendant's double jeopardy rights. The suspended sentence provisions of O.C.G.A. § 17-10-1(a) were inapplicable to the mandatory sentence provisions of § 16-13-31, and there was no indication that the trial court intended to suspend the fine portion. *Strickland v. State*, 301 Ga. App. 272, 687 S.E.2d 221 (2009).

It was not erroneous for the trial court to impose a sentence of 20 years for aggravated battery, O.C.G.A. § 16-5-24, because after the defendant's kidnapping conviction was voided, the trial court was authorized under O.C.G.A. § 17-10-1 to sentence the defendant to a term of years on the aggravated battery count, which could consist of up to 20 years. *Griggs v. State*, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Failure to assert sentence was not allowed by law within required statutory time period.

Defendant could not appeal the denial of a motion to correct a void sentence as the motion was filed in 2007, more than 12 years after the defendant's conviction for armed robbery was affirmed and outside the statutory period in O.C.G.A. § 17-10-1(f), and the defendant's sentence of life imprisonment was not void as the sentence was within the range set out in former O.C.G.A. § 16-8-41(b). *Brown v. State*, 295 Ga. App. 66, 670 S.E.2d 867 (2008).

No authority to modify sentence if sentence not void.

Appellant's motion for sentence modification, asserting that the sentences imposed for armed robbery and burglary were void because the sentences had been imposed without a presentence hearing having been held, was properly denied; rulings on pleadings asserting erroneous procedure or unfair treatment were not subject to direct appeal because they were not rulings on whether the sentence was void, and inasmuch as the assertions contained in appellant's post-appeal seeking sentence modification did not allege the sentences imposed were void (appellant acknowledged that the sentences were within the statutory range), appellant was not entitled to a direct appeal from the trial court's adverse ruling. *Jones v. State*, 278 Ga. 669, 604 S.E.2d 483 (2004).

No power to vacate conviction. — Trial court properly held that it lacked jurisdiction to entertain a defendant's motion to withdraw guilty plea because term of court at which the guilty plea was entered had expired; moreover, authority to modify sentences under O.C.G.A. § 17-10-1(f) did not include power to va-

cate conviction on which the sentence was based. *Ellison v. State*, 283 Ga. 461, 660 S.E.2d 373 (2008).

Defendant's appeal was dismissed as defendant failed to raise valid allegation of void sentence.

Defendant's appeal of an order denying a motion to correct a void sentence was dismissed because the motion was well outside the statutory time period during which a court could correct or reduce a sentence pursuant to O.C.G.A. § 17-10-1(f); because the assertions contained in the defendant's post-O.C.G.A. § 17-10-1(f) motion seeking sentence modification did not allege that the sentences imposed were void, the defendant was not entitled to a direct appeal from the trial court's adverse ruling, and the trial court sentenced the defendant according to the state's recommendation pursuant to the plea negotiations. *Jones v. State*, 303 Ga. App. 319, 693 S.E.2d 499 (2010).

Because there was no showing that sentence was void, denial of defendant's motion for modification was not subject to direct appeal. — Be-

cause defendant failed to show that a sentence to two 20-year terms for child molestation was void as vindictive, pursuant to O.C.G.A. § 17-10-1(f), the denial of defendant's motion for modification was not subject to a direct appeal. *Frazier v. State*, 302 Ga. App. 346, 691 S.E.2d 247 (2010).

Sentencing court could consider defendant's illegal alien status. —

Trial court did not violate defendant's constitutional rights by considering defendant's illegal alien status a relevant factor in formulating an appropriate sentence within the statutory range for burglary under O.C.G.A. § 16-7-1(a); the trial court properly considered that the court could not order defendant to work as a condition of probation. *Trujillo v. State*, 304 Ga. App. 849, 698 S.E.2d 350 (2010).

Trial court not vindictive in imposing new sentence. — Because the defendant's final sentence of 60 years to serve was not longer than the original sentence of life followed by additional terms of years, the trial court was not vindictive in imposing the new sentence as the court did. *Griggs v. State*, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

RESEARCH REFERENCES

ALR. — Construction and application of United States sentencing guideline § 2a2.1(b)(1), 18 U.S.C.A., providing enhancement for attempted murder or assault with intent to commit murder dependent upon nature or degree of injury, 30 ALR Fed. 2d 385.

Construction and application of U.S.S.G. § 5g1.3(b), requiring federal sentence to run concurrently to undischarged state sentence when state sentence has been fully taken into account in determining offense level for federal offense — particular events preceding federal sentence and sentencing credit, 32 ALR Fed. 2d 191.

Construction and application of "official victim" sentencing enhancement of U.S.S.G. § 3a1.2(c) concerning law enforcement officers and prison officials, 32 ALR Fed. 2d 371.

Construction and application of U.S.S.G. § 3b1.1(s) providing sentencing enhancement for organizer or leader of

criminal activity — fraud offenses, 32 ALR Fed. 2d 445.

Downward adjustment for acceptance of responsibility under U.S.S.G. § 3e1.1, 18 USC — fraud offenses, 33 ALR Fed. 2d 477.

Construction and application of U.S.S.G. § 5h1.3, concerning mental and emotional conditions as ground for sentencing departure, 34 ALR Fed. 2d 457.

Construction and application of U.S.S.G. § 3b1.1(b) providing sentencing enhancement for manager or supervisor of criminal activity — drug offenses — cocaine, 35 ALR Fed. 2d 467.

Validity, construction, and application of U.S.S.G. § 5k2.8, providing for upward sentence departure for extreme conduct, 36 ALR Fed. 2d 95.

Construction and application of U.S.S.G. § 2x1.1, providing sentencing guideline for conspiracy not covered by specific offense guideline, 37 ALR Fed. 2d 449.

Construction and application of leader of criminal activity — drug of U.S.S.G., § 3b1.1(a), 18 USCS, providing fines, 43 ALR Fed. 2d 365. sentencing enhancement for organizer or

17-10-1.2. Oral victim impact statement; presentation of evidence; cross-examination and rebuttal by defendant; effect of noncompliance; no creation of cause of action or right of appeal.

(a)(1) In all cases in which the death penalty may be imposed, subsequent to an adjudication of guilt and in conjunction with the procedures in Code Section 17-10-30, the court shall allow evidence from the family of the victim, or such other witness having personal knowledge of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community. Except as provided in paragraph (4) of this subsection, such evidence shall be given in the presence of the defendant and of the jury and shall be subject to cross-examination.

(2) The admissibility of the evidence described in paragraph (1) of this subsection and the number of witnesses other than immediate family who may testify shall be in the sole discretion of the judge and in any event shall be permitted only in such a manner and to such a degree as not to inflame or unduly prejudice the jury. As used in this paragraph, the term "immediate family" means the victim's spouse, child, parent, stepparent, grandparent, grandchild, sibling, stepbrother, stepsister, mother-in-law, father-in-law, sister-in-law, or brother-in-law and the spouses of any such individuals.

(3) In all cases other than those in which the death penalty may be imposed, prior to fixing of the sentence as provided for in Code Section 17-10-1 or the imposing of life imprisonment as mandated by law, and before rendering the appropriate sentence, including any order of restitution, the court shall allow the victim, as such term is defined in Code Section 17-17-3, the family of the victim, or such other witness having personal knowledge of the crime to testify about the impact of the crime on the victim, the family of the victim, or the community. Except as provided in paragraph (4) of this subsection, such evidence shall be given in the presence of the defendant and shall be subject to cross-examination. The admissibility of the testimony and evidence in support of such testimony shall be in the sole discretion of the judge and in any event shall be permitted only in such a manner as to allow for cross-examination by the defendant and to such a degree as not to unduly prejudice the defendant. If the judge excludes the testimony or evidence in support of such testimony, the state shall be allowed to make a proffer of such testimony or evidence.

(4) Upon a finding by the court specific to the case and the witness that the witness would not be able to testify in person without showing undue emotion or that testifying in person will cause the witness severe physical or emotional distress or trauma, evidence presented pursuant to this subsection may be in the form of, but not limited to, a written statement or a prerecorded audio or video statement, provided that such witness is subject to cross-examination and the evidence itself will not be available to the jury during deliberations. Photographs of the victim may be included with any evidence presented pursuant to this subsection.

(5) If the accused has been convicted of a serious violent felony as defined in Code Section 17-10-6.1, attempted murder or attempted kidnapping, or any violation of Code Section 16-5-90, 16-5-91, 16-7-82, 16-7-84, or 16-7-86, and the victim or a representative of the victim is not present at the presentence hearing, it shall be the duty of the court to inquire of the prosecuting attorney whether or not the victim has been notified of the presentence hearing as provided in Code Section 17-17-5. If the court finds that the prosecuting attorney has not made a reasonable attempt to notify the victim, the presentence hearing shall be recessed in order to provide the victim the opportunity to attend prior to sentence being imposed; provided, however, that prior to recessing the presentence hearing, the court shall allow the state or the accused to call any witnesses who were subpoenaed and are present at such presentence hearing. Following any such testimony, the presentence hearing shall be recessed and the victim shall be notified of the date, time, and location when the presentence hearing shall resume.

(b) In presenting such evidence, the victim, the family of the victim, or such other witness having personal knowledge of the impact of the crime on the victim, the victim's family, or the community shall, if applicable:

- (1) Describe the nature of the offense;
- (2) Itemize any economic loss suffered by the victim or the family of the victim, if restitution is sought;
- (3) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
- (4) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
- (5) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
- (6) Include any other information related to the impact of the offense upon the victim, the victim's family, or the community that the court inquires of.

(c) The court shall allow the defendant the opportunity to cross-examine and rebut the evidence presented of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community, and such cross-examination and rebuttal evidence shall be subject to the same discretion set forth in paragraph (1) of subsection (a) of this Code section.

(d) No sentence shall be invalidated because of failure to comply with the provisions of this Code section. This Code section shall not be construed to create any cause of action or any right of appeal on behalf of the victim, the state, or the accused; provided, however, that if the court intentionally fails to comply with this Code section, the victim may file a complaint with the Judicial Qualifications Commission. (Code 1981, § 17-10-1.2, enacted by Ga. L. 1985, p. 739, § 1; Ga. L. 1993, p. 1660, § 2; Ga. L. 2009, p. 192, § 1/SB 151; Ga. L. 2010, p. 214, § 4/HB 567.)

The 2009 amendment, effective July 1, 2009, in paragraph (a)(1), substituted "shall" for "may" in the middle of the first sentence and substituted "Except as provided in paragraph (4) of this subsection, such" for "Such" at the beginning of the second sentence; in paragraph (a)(2), added the paragraph (a)(2) designation, substituted "the admissibility of the evidence described in paragraph (1) of this subsection and the number of witnesses other than immediate family who may testify" for "The admissibility of such evidence" at the beginning of the first sentence and added the last sentence; redesignated former paragraph (a)(2) as present paragraph (a)(3); in paragraph (a)(3), in the first sentence, substituted "shall" for "within its discretion, may" in the middle and inserted "the" near the end, in the second sentence, substituted "Except as provided in paragraph (4) of this subsection, such" for "Such" at the beginning, and added the last sentence; and added paragraph (a)(4).

The 2010 amendment, effective July

1, 2010, in the first sentence of paragraph (a)(3), substituted "allow the victim, as such term is defined in Code Section 17-17-3," for "allow evidence from the victim", and inserted "crime to testify about the" near the end, in the third sentence, substituted "the testimony and evidence in support of such testimony shall be in the sole discretion of the judge and in any event shall be permitted" for "the evidence described in this paragraph shall be in the sole discretion of the judge and in any event shall be permitted", and added the last sentence; added paragraph (a)(5); and substituted "behalf of the victim, the state, or the accused; provided, however, that if the court intentionally fails to comply with this Code section, the victim may file a complaint with the Judicial Qualifications Commission" for "behalf of any person" in the last sentence of subsection (d).

Law reviews. — For annual survey of law on evidence, see 62 Mercer L. Rev. 125 (2010). For article, "Criminal Procedure," see 27 Ga. St. U. L. Rev. 29 (2011).

JUDICIAL DECISIONS

Scope of victim impact testimony.

Trial court abused the discretion granted by O.C.G.A. § 17-10-1.2 in allowing murder victims' family members to testify by offering opinions about the defendant and the murders because such

victim impact evidence unduly prejudiced the jury; the witnesses testified that the victims were "shot and left in a patch of kudzu as if they were a piece of trash on the side of the road," that the victims were "left under trash and branches, left to

die,” and that the crimes were “a senseless, selfish act of nothing but wickedness and evil.” While some of the witnesses’ characterizations may have been supported by the evidence presented at trial, the witnesses did not have personal knowledge of many of the facts to which the witnesses testified, and the statements, even if supported by the evidence, were particularly inflammatory and prejudicial coming from members of the victims’ families; further, the witnesses were also improperly allowed to present the witnesses own unduly prejudicial characterizations and opinions of the defendant. *Bryant v. State*, 288 Ga. 876, 708 S.E.2d 362 (2011).

Victim impact evidence not improper.

Victim impact evidence was properly admitted through the testimony of a child murder victim’s father that, since the crimes, he had suffered depression, nightmares, had trouble sleeping, and had seen a psychiatrist, and the testimony of the child’s mother that her sadness, crying, and being in a “dazed state” had spurred her to visit a psychologist for three months and a counselor for six months. It

was not required that the victims read their statements. *Foster v. State*, 288 Ga. 98, 701 S.E.2d 189 (2010).

Counsel was not deficient in failing to object to the prosecutor’s victim impact argument during opening statement because negative characterizations of the victim were proper since the characterizations were relevant to evidence later offered to explain the context in which the drug-related crimes occurred, and the prosecutor’s allusion to the fact that the victim was no longer alive was relevant to the murder charge; a witness’s testimony and photographs of the witness’s injuries were directly relevant and admissible to prove the charge against the defendant of committing aggravated assault on the witness. *Lacey v. State*, 288 Ga. 341, 703 S.E.2d 617 (2010).

Harmless error. — Although some of the victim impact testimony admitted over the defendant’s objection was improper, the testimony did not require reversal of the defendant’s death sentence because the admission was harmless beyond a reasonable doubt. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

17-10-2. Conduct of presentence hearings in felony cases; effect of reversal for error in presentence hearing.

(a)(1) Except in cases in which the death penalty may be imposed, upon the return of a verdict of “guilty” by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the accused, or the absence of any prior conviction and pleas.

(2) The judge shall also hear argument by the accused or the accused’s counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. Except in cases where the death penalty may be imposed, the prosecuting attorney shall open and conclude the argument. In cases where the death penalty may be imposed, the prosecuting attorney shall open and the accused or the accused’s counsel shall conclude the argument.

(3) Upon the conclusion of the evidence and arguments, the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law.

(b) In cases in which the death penalty may be imposed, the judge, when sitting without a jury, in addition to the procedure set forth in subsection (a) of this Code section, shall follow the procedures provided for in Code Section 17-10-30.

(c) In all cases tried by a jury in which the death penalty may be imposed, upon a return of a verdict of “guilty” by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. The hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided for in subsection (a) of this Code section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code Section 17-10-30, exist and whether to recommend mercy for the accused. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

(d) If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment. (Code 1933, § 27-2503, enacted by Ga. L. 1974, p. 352, § 7; Ga. L. 1990, p. 8, § 17; Ga. L. 1993, p. 1654, § 2; Ga. L. 2005, p. 20, § 11/HB 170; Ga. L. 2009, p. 223, § 2/SB 13.)

The 2009 amendment, effective April 29, 2009, deleted “or life without parole” following “death penalty” throughout this Code section; in paragraphs (a)(1) and (a)(2) and subsection (c), substituted “accused” and “accused’s” for “defendant” and “defendant’s”, respectively; and, at the end of subsection (b), substituted “Code Section 17-10-30” for “Code Sections 17-10-30 and 17-10-30.1”. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2009, p. 223, § 8, not codified by the General Assembly, provides that: “Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sen-

tenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand.”

Ga. L. 2009, p. 223, § 9, not codified by the General Assembly, provides that: “Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act.”

Ga. L. 2009, p. 223, § 10, not codified by the General Assembly, provides that: “A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state.” Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a), not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and

before April 29, 2009, and the amendments by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law,

nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Law reviews. — For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.-L. Rev. 995 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JUDICIAL SENTENCING FOR FELONIES

APPELLATE REVIEW

General Consideration

Notice of prior offenses used for recidivist purposes.

Prior convictions listed on an attached GCIC as aggravation evidence for a defendant's sentencing for theft by deception were sufficient notice that the state intended to seek sentencing as a recidivist under O.C.G.A. §§ 17-10-2 and 17-10-7. *Parks v. State*, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

With regard to a defendant's convictions for aggravated assault, false imprisonment, and other crimes, the trial court did not err in sentencing the defendant as a recidivist despite the state serving notice of the state's intent to seek recidivism treatment until the morning of trial as, under O.C.G.A. § 17-10-2(a), such notice was timely and sufficient. *Daniels v. State*, 296 Ga. App. 795, 676 S.E.2d 13 (2009).

Notifying defendant of evidence to be presented.

Defendant waived appellate review of the defendant's argument that the trial court erred in considering a prior sexual battery charge at the pre-sentencing hearing because at the pre-sentencing hearing, the defendant made no objection to the use of that evidence in aggravation of punishment under O.C.G.A. § 17-10-2; even if the defendant had not waived the objection and did not receive proper notice of the state's intent to introduce the prior conviction at sentencing, the argument failed because in the court's order denying

the motion for new trial, the trial court specifically stated that the court did not consider the prior conviction in sentencing the defendant. *Andrews v. State*, 307 Ga. App. 557, 705 S.E.2d 319 (2011).

Since defendant's counsel spoke for defendant, etc.

The trial court did not violate defendant's right of allocution when the trial court instructed defendant not to interrupt its pronouncement of sentence; the requirements of O.C.G.A. § 17-10-2 were met when defendant's counsel spoke on defendant's behalf at the sentencing hearing. *Habersham v. State*, 289 Ga. App. 718, 658 S.E.2d 253 (2008).

Defective notice does not void sentence. — When the defendant, whose conviction had been affirmed on direct appeal, later filed a motion to correct sentence on the ground that the defendant had not received notice under O.C.G.A. § 17-10-2 of the state's intent to use prior convictions to seek recidivist punishment, the court lacked jurisdiction over the appeal from the denial of the motion. Defective notice did not void the sentence; rather, it was a procedural defect. *Ward v. State*, 299 Ga. App. 63, 682 S.E.2d 128 (2009).

No error on part of trial court in prohibiting defendant's remarks at inappropriate time. — With regard to a defendant's convictions on three counts of aggravated assault with intent to rob, the trial court did not err by refusing to allow the defendant to speak and to offer evi-

dence in mitigation of the punishment at sentencing as, to the contrary, the record revealed that the trial court heard evidence in mitigation from two of defendant's relatives, heard the arguments of defense counsel, and when the trial court asked the defendant directly if the defendant had anything to say, the defendant responded in the negative. After the trial court began to pronounce sentence, the defendant interrupted, indicating a desire to make a statement, and there was no error on the part of the trial court finding that it was too late; further, the trial court did not violate the defendant's right of allocution when the court instructed the defendant not to interrupt the court's pronouncement of sentence. *Pilkington v. State*, 298 Ga. App. 317, 680 S.E.2d 164 (2009), cert. denied, No. S09C1717, 2010 Ga. LEXIS 54 (Ga. 2010).

Cited in *Jones v. State*, 278 Ga. 669, 604 S.E.2d 483 (2004); *Evans v. State*, 290 Ga. App. 746, 660 S.E.2d 841 (2008); *Beck v. State*, 292 Ga. App. 472, 665 S.E.2d 701 (2008); *Wells v. State*, 294 Ga. App. 277, 668 S.E.2d 881 (2008); *Redden v. State*, 294 Ga. App. 879, 670 S.E.2d 552 (2008); *Noellien v. State*, 298 Ga. App. 47, 679 S.E.2d 75 (2009).

Judicial Sentencing for Felonies

Prior convictions admissible in sentencing phase.

Admission of the defendant's prior convictions during the sentencing phase was harmless beyond a reasonable doubt because the victim of the prior crimes supported the defense's arguments that the defendant had always been quick to admit the defendant's violent acts and that those acts were the result of the defendant's alcoholism, and it undermined the state's attempt to show that the defendant had exhibited a pattern of committing domestic abuse and of financial dependence on women; there was overwhelming evidence of the statutory aggravating circumstances supporting the death penalty in

the case, and the jury was authorized to consider the similar transaction evidence at the sentencing phase. *Arrington v. State*, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, U.S. , 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Trial court did not err in sentencing the defendant as a recidivist because the defendant failed to rebut the presumption of regularity and failed to object to the form of the evidence of the prior convictions at the pre-sentence hearing and, thus, failed to preserve the issue for review on appeal; the state served the defendant with a list of evidence in aggravation of sentencing and specifically invoked the statutory recidivist sentencing provisions, and at the pre-sentence hearing, the trial court had copies of the prior convictions, but defense counsel never objected to the consideration of any of the listed offenses or argued that the state was required to introduce the prior convictions into evidence. *Wells v. State*, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

A defendant's acquiescence to an illegal sentence, either through plea negotiations or a failure to object to the sentence, cannot render an otherwise illegal sentence valid through waiver. — Defendant agreed to a sentence that included convictions that should have been merged, and therefore the sentence was void. Defendant improperly gave up the right to a sentencing presentation and argument under O.C.G.A. § 17-10-2 and therefore the case was remanded for sentencing. *Wells v. State*, 294 Ga. App. 277, 668 S.E.2d 881 (2008).

Appellate Review

Waiver can result from the failure to object, etc.

Because the defendant failed to raise at the sentencing hearing the argument that the trial court erred by sentencing the defendant as a recidivist, appellate review was precluded. *Wells v. State*, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

RESEARCH REFERENCES

ALR. — Admissibility of testimony at sentencing, within meaning of U.S.S.G.

§ 6a1.3, which requires such information be relevant and have "sufficient indicia of

reliability to support its probable accuracy”, 45 ALR Fed. 2d 457.

Admissibility of evidence, other than testimony given at sentencing, within meaning of U.S.S.G. § 6a1.3, which re-

quires such information be relevant and have “sufficient indicia of reliability to support its probable accuracy” — concerning sworn information, 46 ALR Fed. 2d 151.

17-10-3. Punishment for misdemeanors generally.

JUDICIAL DECISIONS

ANALYSIS

SENTENCE PROPER

Sentence Proper

Sentence upheld.

While a defendant provided no statutory or legal authority for a claim that the sentence for the defendant’s conviction for harassing phone calls under O.C.G.A. § 16-11-39.1(a) was excessive and thus abandoned the claim under Ga. Ct. App. R. 25(c)(2), the defendant’s sentence of 12 months probated, 240 hours of community service, completion of an anger management counseling program, no contact with the victim, and a \$500 fine was within the range provided in O.C.G.A. § 17-10-3(a)(1). *Williams v. State*, 296 Ga. App. 707, 675 S.E.2d 596 (2009).

Defendant’s sentence to serve 12

months for speeding in violation of O.C.G.A. § 40-6-181(b)(2) was within authorized limits; O.C.G.A. § 40-6-1(b) simply sets limits on fines that can be imposed as punishment for a first offense of speeding and the statute does not restrict the available punishment for speeding to a fine. *Jones v. State*, 308 Ga. App. 99, 706 S.E.2d 593 (2011).

Defendant’s sentence for violating O.C.G.A. § 40-6-271 would not be set aside on the ground that the sentence was excessive and the punishment cruel and unusual because the sentence was within the limits of the law, O.C.G.A. § 17-10-3(a)(1) and (b). *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012).

17-10-6.1. Punishment for serious violent offenders.

(a) As used in this Code section, the term “serious violent felony” means:

- (1) Murder or felony murder, as defined in Code Section 16-5-1;
- (2) Armed robbery, as defined in Code Section 16-8-41;
- (3) Kidnapping, as defined in Code Section 16-5-40;
- (4) Rape, as defined in Code Section 16-6-1;

(5) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(6) Aggravated sodomy, as defined in Code Section 16-6-2; or

(7) Aggravated sexual battery, as defined in Code Section 16-6-22.2.

(b)(1) Notwithstanding any other provisions of law to the contrary, any person convicted of the serious violent felony of kidnapping involving a victim who is 14 years of age or older or armed robbery shall be sentenced to a mandatory minimum term of imprisonment of ten years and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court and shall not be reduced by any form of pardon, parole, or commutation of sentence by the State Board of Pardons and Paroles.

(2) Notwithstanding any other provisions of law to the contrary, the sentence of any person convicted of the serious violent felony of:

(A) Kidnapping involving a victim who is less than 14 years of age;

(B) Rape;

(C) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(D) Aggravated sodomy, as defined in Code Section 16-6-2; or

(E) Aggravated sexual battery, as defined in Code Section 16-6-22.2

shall, unless sentenced to life imprisonment, be a split sentence which shall include a mandatory minimum term of imprisonment of 25 years, followed by probation for life. No portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court or reduced by any form of pardon, parole, or commutation of sentence by the State Board of Pardons and Paroles.

(3) No person convicted of a serious violent felony shall be sentenced as a first offender pursuant to Article 3 of Chapter 8 of Title 42, relating to probation for first offenders, or any other provision of Georgia law relating to the sentencing of first offenders. The State of Georgia shall have the right to appeal any sentence which is imposed by the superior court which does not conform to the provisions of this subsection in the same manner as is provided for other appeals by the state in accordance with Chapter 7 of Title 5, relating to appeals or certiorari by the state.

(c)(1) Except as otherwise provided in subsection (c) of Code Section 42-9-39, for a first conviction of a serious violent felony in which the accused has been sentenced to life imprisonment, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles until that person has served

a minimum of 30 years in prison. The minimum term of imprisonment shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(2) For a first conviction of a serious violent felony in which the accused has been sentenced to death but the sentence of death has been commuted to life imprisonment, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles until that person has served a minimum of 30 years in prison. The minimum term of imprisonment shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(3) For a first conviction of a serious violent felony in which the accused has been sentenced to imprisonment for life without parole, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(4) Except as otherwise provided in this subsection, any sentence imposed for the first conviction of any serious violent felony shall be served in its entirety as imposed by the sentencing court and shall not be reduced by any form of parole or early release administered by the State Board of Pardons and Paroles or by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the period of incarceration ordered by the sentencing court; provided, however, during the final year of incarceration an offender so sentenced shall be eligible to be considered for participation in a department administered transitional center or work release program.

(d) For purposes of this Code section, a first conviction of any serious violent felony means that the person has never been convicted of a serious violent felony under the laws of this state or of an offense under the laws of any other state or of the United States, which offense if committed in this state would be a serious violent felony. Conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction. (Code 1981, § 17-10-6.1, enacted by Ga. L. 1994, p. 1959, § 11; Ga. L. 1998, p. 180, § 2; Ga. L. 2006, p. 379, § 20/HB 1059; Ga. L. 2009, p. 64, § 1/SB 193; Ga. L. 2009, p. 223, § 3/SB 13; Ga. L. 2011, p. 752, § 17/HB 142.)

The 2009 amendments. — The first 2009 amendment, effective July 1, 2009, added a proviso at the end of paragraph (c)(3). The second 2009 amendment, effective April 29, 2009, in subsection (c), substituted “accused” for “defendant” in paragraphs (c)(1) and (c)(2), added paragraph (c)(3), redesignated former paragraph (c)(3) as present paragraph (c)(4), and, in paragraph (c)(4), substituted “Except as otherwise provided in this subsection, any” for “Any” at the beginning and deleted “other than a sentence of life imprisonment or life without parole or death” following “felony” near the beginning. See editor’s note for applicability.

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, substituted “or reduced” for “and shall not be reduced” in the concluding language of paragraph (b)(2).

Editor’s notes. — Ga. L. 2009, p. 223, § 8, not codified by the General Assembly, provides that: “Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand.”

Ga. L. 2009, p. 223, § 9, not codified by the General Assembly, provides that: “Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act.”

Ga. L. 2009, p. 223, § 10, not codified by the General Assembly, provides that: “A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state.” Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a), not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009, and the amendments by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b), not codified by the General Assembly, provides that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

Ga. L. 2011, p. 752, § 17(2), not codified by the General Assembly, provides, in part, that the amendment to paragraph (b)(2) was made to conform with *Merritt v. State*, 286 Ga. 650 (2010).

JUDICIAL DECISIONS

Constitutionality.

Statutory scheme governing punishment for a first-time rape conviction, O.C.G.A. §§ 16-6-1(b) and 17-10-6.1, gave a defendant fair notice that the defendant could be sentenced either to life imprisonment, eligible for parole after 30 years, or a minimum of 25 years without parole, with any additional years likewise not subject to any possibility of parole. Therefore, the statutes were not unconstitutionally vague and allowed the defendant to intelligently plea bargain. *Merritt v. State*, 286 Ga. 650, 690 S.E.2d 835 (2010).

Eighth Amendment not violated by service of mandatory minimum sentences. — Defendant failed to show that trial counsel was ineffective by failing to assert that the state’s statutory and constitutional provisions requiring the service of mandatory minimum sentences before consideration for parole regardless of age constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution because any consideration for Eighth Amendment purposes of incomplete brain maturation due solely to age was inappro-

appropriate since the defendant was 20 years old at the time the defendant committed the crime and was sentenced to a term of years rather than death. *Gandy v. State*, 290 Ga. 166, 718 S.E.2d 287 (2011).

Hearsay statement of prosecutor establishing fact for sentencing. —

Defendant's sentence was vacated because although the fact that the defendant was sentenced as a recidivist did not appear on the face of the sentencing sheet, the trial court did indicate that the court was following the state's recommendation in sentencing the defendant, and that recommendation included that the defendant be sentenced as a recidivist; a trial court cannot rely upon the hearsay statement of a prosecutor to establish a fact for purposes of sentencing. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Sentence upheld.

Claim by the defendant that a sentence pursuant to O.C.G.A. §§ 16-6-22.2(b) and 17-10-6.1(b)(2) constituted cruel and unusual punishment because the sentence was grossly out of proportion to the severity of the crime, and that the sentence was overly severe under the circumstances, was within the exclusive jurisdiction of the Georgia Supreme Court where the claim challenged the constitutionality of the statutes themselves; as the sentence was legally authorized and within statutory limits, the sentence was upheld. *Colton v. State*, 297 Ga. App. 795, 678 S.E.2d 521 (2009).

Application to kidnapping.

Trial counsel did not render ineffective assistance by failing to raise the constitutionality of the defendant's mandatory minimum sentence of 25 years imprisonment without parole, as codified in O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2), because the defendant's concurrent 25-year sentences for child kidnapping did not raise a threshold inference of gross disproportionality; after beating the mother in the young children's presence so severely as to break her jaw and cause other injuries, the defendant ordered all three of the victims to enter a car, drove the victims away, and left the victims in a location where the victims were isolated and unprotected. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

O.C.G.A. §§ 16-5-40(d)(2) and

17-10-6.1(b)(2), as applied to the defendant, did not violate due process because an earlier indictment charged regular kidnapping and, only after plea negotiations failed, the more severe sentence was included in a re-indictment because such circumstances did not raise a presumption of prosecutorial vindictiveness in the absence of actual evidence thereof. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2) do not violate equal protection by punishing a person differently depending on the age of the victim because that classification is not arbitrarily drawn and, instead, is rationally related to the legitimate governmental interest in protecting children. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

Application to child molestation.

Defendant failed to establish that the defendant was rendered ineffective assistance of counsel with regard to a guilty plea to aggravated child molestation and other crimes as the defendant failed to show that the defendant indicated any time prior to sentencing that the defendant wanted to withdraw the guilty plea. Further, although the defendant established that defense counsel improperly advised the defendant that parole was possible, since the defense strategy in seeking the plea agreement was not to ensure parole eligibility but to minimize the defendant's exposure to sentencing as a recidivist, no ineffectiveness was established. *Floyd v. State*, 293 Ga. App. 235, 666 S.E.2d 611 (2008).

Application to incest. — Trial court did not abuse the court's discretion in denying a defendant's post-conviction motion for deoxyribonucleic acid (DNA) testing because the defendant was barred from requesting DNA testing under O.C.G.A. § 5-5-41(c)(3) since the defendant's conviction for the crime of incest in violation of O.C.G.A. § 16-6-22(a)(3) was not defined as a serious violent felony under O.C.G.A. § 17-10-6.1(a). *Hunter v. State*, 294 Ga. App. 583, 669 S.E.2d 533 (2008).

Plea bargains.

Defendant was not entitled to relief under 28 U.S.C. § 2254; he failed to show

that he was prejudiced by counsel's failure to inform defendant that he faced a mandatory life sentence under O.C.G.A. § 17-10-6.1 because the evidence showed that defendant likely would not have accepted a plea bargain that included a 15 to 25-year sentence because the victim's whereabouts were unknown, and defendant felt that the aggravated assault and armed robbery case against him was weak without the victim's testimony. *Carson v. Thompson*, No. 06-12691, 2007 U.S. App. LEXIS 9692 (11th Cir. Apr. 27, 2007) (Unpublished).

Counsel ineffective for failing to inform defendant of ineligibility for parole. — Habeas court erred by holding that a petitioner was not affirmatively misinformed by petitioner's counsel regarding petitioner's parole eligibility on a 20-year sentence for armed robbery because, under O.C.G.A. § 17-10-6.1, the petitioner was required to serve the entire 20 years. Remand to the habeas court was required to determine whether, but for counsel's deficiency, the petitioner would have proceeded to trial rather than pled guilty. *Johnson v. Roberts*, 287 Ga. 112, 694 S.E.2d 661 (2010).

Ignorance of parole eligibility was a collateral consequence that did not render defendant's guilty plea involuntary. A defendant's claimed lack of

knowledge that, pursuant to O.C.G.A. § 17-10-6.1(c)(1), the defendant would be ineligible for parole until the defendant had served 30 years, did not render the guilty plea to felony murder and other crimes involuntary, because the knowledge of parole ineligibility was a collateral consequence. *Stinson v. State*, 286 Ga. 499, 689 S.E.2d 323 (2010).

Motion to be removed from sex offender registry properly denied and first offender treatment inappropriate. — Trial court properly denied a defendant's motion to remove the defendant from the sex offender registry, or in the alternative to be resentenced as a first offender, as the United States Supreme Court had already determined that retroactive registration of sex offenders was nonpunitive and did not constitute an ex post facto law, and to resentence the defendant as a first offender would be in direct contravention of the plain language of O.C.G.A. §§ 17-10-6.1 and 42-1-12 since the defendant pled guilty but mentally ill to kidnaping a child under the age of 14, which was a serious violent felony. *Finnicum v. State*, 296 Ga. App. 86, 673 S.E.2d 604 (2009).

Cited in *Dunagan v. State*, 283 Ga. 501, 661 S.E.2d 525 (2008); *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008); *Cox v. Howerton*, 290 Ga. 693, 723 S.E.2d 891 (2012).

17-10-6.2. Punishment for sexual offenders.

JUDICIAL DECISIONS

"Sexual offense" applies only to section. — O.C.G.A. § 17-10-6.2 does not explain when registration as a sex offender is required but rather proscribes the mandatory minimum sentence for individuals convicted of a "sexual offense" and sets forth circumstances under which the trial court may depart from that sentence. The definition of "sexual offense" in § 17-10-6.2 has no application beyond that code section. *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Denial of petition for release from requirement to register. — A trial court did not abuse the court's discretion by denying defendant's petition for release

from the requirement to register as a sexual offender for life as defendant failed to make a prima facie showing that defendant was no longer a substantial risk of reoffending since an agency abuse case was pending against defendant, which required a child of defendant to not bring any children around defendant, and defendant characterized the conduct involving the child molestation of defendant's three children as a mistake, which everyone makes. *Miller v. State*, 291 Ga. App. 478, 662 S.E.2d 261 (2008).

Trial court did not abuse the court's discretion by denying a defendant's petition seeking relief from the sexual of-

fender registration requirements, pursuant to O.C.G.A. § 42-1-12(g)(1), because the defendant failed to provide a report from a licensed psychiatrist that allegedly set forth an opinion that the defendant posed no threat whatsoever of reoffending. Further, the defendant failed to provide any additional information regarding the underlying conduct for the out-of-state conviction that required the registration. In *re Baucom*, 297 Ga. App. 661, 678 S.E.2d 118 (2009).

Defendant's confinement in a probation detention center was not equivalent to confinement in prison for purposes of O.C.G.A. § 42-1-12(g) and therefore the 10-year waiting period for release from sex offender registration requirements did not begin running upon the defendant's release from the center, but from the date the defendant was released from probation. The trial court did not err in finding that the defendant was sentenced pursuant to O.C.G.A. § 17-10-6.2(c), although that section was not enacted until after the defendant's conviction. In *re White*, 306 Ga. App. 365, 702 S.E.2d 694 (2010).

Motion to be removed from sex offender registry properly denied. — Trial court properly denied a defendant's motion to remove the defendant from the sex offender registry, or in the alternative to be resentenced as a first offender, as the United States Supreme Court had already determined that retroactive registration of sex offenders was nonpunitive and did not constitute an *ex post facto* law, and to resentence the defendant as a first offender would be in direct contravention of the plain language of O.C.G.A. §§ 17-10-6.1 and 42-1-12 since the defendant pled guilty but mentally ill to kidnapping a child under the age of 14, which

was a serious violent felony. *Finnicum v. State*, 296 Ga. App. 86, 673 S.E.2d 604 (2009).

First offender consideration appropriate. — Based on the plain language of O.C.G.A. §§ 17-10-6.2(a)(4) and 42-8-60(d)(2), a defendant who commits statutory rape is excluded from first offender consideration only if the defendant was 21 years of age or older. Thus, a defendant who was 18 at the time of the offense and 19 at the time of the conviction was eligible for first offender consideration. *Planas v. State*, 296 Ga. App. 51, 673 S.E.2d 566 (2009).

Sentencing discretion. — Trial court erred in determining that the court was without discretion to deviate from the minimum sentencing requirements of O.C.G.A. § 17-10-6.2(b), and the court of appeals erred in affirming that ruling because the defendants were charged with possession of material in violation of O.C.G.A. § 16-12-100(b)(8) and, therefore, it would have to be shown that the child victims in the images that were stored in the defendants' computers were physically restrained at the same time that the defendants possessed the offending material in order for O.C.G.A. § 17-10-6.2(c)(1)(F) to exclude the trial court from having the sentencing discretion set forth in O.C.G.A. § 17-10-6.2(c)(1), but no such evidence existed; O.C.G.A. § 17-10-6.2(c)(1)(F) precludes the trial court from exercising sentencing discretion when the victim was physically restrained during the commission of the offense, and the use of the words "during the commission of the offense" in O.C.G.A. § 17-10-6.2(c)(1)(F) must be given effect. *Hedden v. State*, 288 Ga. 871, 708 S.E.2d 287 (2011).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statute including "sexually motivated offenses" within definition

of sex offense for purposes of sentencing or classification of defendant as sex offender, 30 ALR6th 373.

17-10-6.3. Disposition of cases currently under review by three-judge panel; duties and responsibilities of the president of The Council of Superior Court Judges of Georgia with respect to abolishing the three-judge panel.

JUDICIAL DECISIONS

Former § 17-10-6. — Trial court properly ruled that O.C.G.A. § 17-10-6, which authorized the Georgia Sentence Review Panel to review and reduce sentences, was unconstitutional as the Georgia General Assembly does not have the constitutional authority to divest the trial courts of Georgia of their traditional jurisdiction over sentencing by creating a quasi-appellate tribunal (such as the Panel) to review and alter the otherwise lawful sentences imposed by those trial courts. Sentence Review Panel v. Moseley, 284 Ga. 128, 663 S.E.2d 679 (2008).

Former § 17-10-6 not to be applied retroactively. — Trial court erred by holding that the unconstitutionality of former O.C.G.A. § 17-10-6 applied retroactively to an inmate whose sentence for voluntary manslaughter was reduced by the Georgia Sentence Review Panel and to other defendants similarly situated as the trial court should have applied the ruling

prospectively only. Sentence Review Panel v. Moseley, 284 Ga. 128, 663 S.E.2d 679 (2008).

Denial of motion to withdraw guilty plea proper. — Denial of the defendant's motion to withdraw a guilty plea pursuant to Ga. Unif. Super. Ct. R. 33.12(A) was proper because the defendant failed to establish that but for defense counsel's failure to inform the defendant of the repeal of former O.C.G.A. § 17-10-6, which allowed for a sentence review, the defendant would have insisted on a trial; further, the defendant was aware of the maximum sentence, and the availability of a sentence review did not alter the possibility that the defendant could have potentially been required to serve up to 66 years in prison. The record supported a finding that the defendant entered the plea knowingly, intelligently, and voluntarily. Vaughn v. State, 298 Ga. App. 669, 680 S.E.2d 680 (2009).

17-10-7. Punishment of repeat offenders; punishment and eligibility for parole of persons convicted of fourth felony offense.

(a) Except as otherwise provided in subsection (b) or (b.1) of this Code section, any person who, after having been convicted of a felony offense in this state or having been convicted under the laws of any other state or of the United States of a crime which if committed within this state would be a felony and sentenced to confinement in a penal institution, commits a felony punishable by confinement in a penal institution shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense.

(b)(1) As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1.

(2) Any person who has been convicted of a serious violent felony in this state or who has been convicted under the laws of any other state or of the United States of a crime which if committed in this state would be a serious violent felony and who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death shall be sentenced to imprisonment for life without parole. Any such sentence of life without parole shall not be suspended, stayed, probated, deferred, or withheld, and any such person sentenced pursuant to this paragraph shall not be eligible for any form of pardon, parole, or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or any other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the sentence of life imprisonment without possibility of parole, except as may be authorized by any existing or future provisions of the Constitution.

(b.1) Subsections (a) and (c) of this Code section shall not apply to a second or any subsequent conviction for any violation of subsection (a), paragraph (1) of subsection (i), or subsection (j) of Code Section 16-13-30.

(c) Except as otherwise provided in subsection (b) or (b.1) of this Code section, any person who, after having been convicted under the laws of this state for three felonies or having been convicted under the laws of any other state or of the United States of three crimes which if committed within this state would be felonies, commits a felony within this state shall, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.

(d) For the purpose of this Code section, conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

(e) This Code section is supplemental to other provisions relating to recidivous offenders. (Laws 1833, Cobb's 1851 Digest, p. 840; Code 1863, § 4562; Code 1868, § 4582; Code 1873, § 4676; Code 1882, § 4676; Penal Code 1895, § 1042; Penal Code 1910, § 1068; Code 1933, § 27-2511; Ga. L. 1953, Nov.-Dec. Sess., p. 289, § 1; Ga. L. 1974, p. 352, § 5; Ga. L. 1983, p. 3, § 14; Ga. L. 1984, p. 760, § 2; Ga. L. 1994, p. 1959, § 12; Ga. L. 2010, p. 563, § 1/HB 901; Ga. L. 2012, p. 899, § 4-4/HB 1176.)

The 2010 amendment, effective July 1, 2010, substituted “state shall” for “state other than a capital felony must” near the middle of subsection (c).

The 2012 amendment, effective July 1, 2012, in subsection (a), near the beginning, inserted “or (b.1)” and inserted “who, after having been”, substituted “commits” for “who shall afterwards commit” near the middle, and deleted a comma following “penal institution”; added subsection (b.1); and inserted “or (b.1)” near the beginning of subsection (c). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ALLEGATION AND PROOF OF PRIOR CONVICTIONS

General Consideration

State must elect whether state intends to use evidence of prior conviction to support a conviction for possession of a firearm by a convicted felon or for recidivist sentencing.

Conviction for possession of a firearm by a convicted felon could not stand because the same prior conviction could not support both recidivist sentencing and a conviction of possession of a firearm by a convicted felon, and also a *nolo contendere* plea could not serve as proof of a prior conviction for charge of possession of a firearm by a convicted felon; prior conviction remained available to support enhanced sentencing as a recidivist, however. *Wyche v. State*, 291 Ga. App. 165, 661 S.E.2d 226 (2008), cert. denied, 2008 Ga. LEXIS 914 (Ga. 2008).

Construed with § 16-13-31.

Defendant’s sentence of 30 years without parole for trafficking in cocaine was a sentence allowed under O.C.G.A. § 16-13-30(d), and hence, not illegal or void. Defendant could not have been sentenced under O.C.G.A. § 17-10-7(a), or the defendant’s sentence would have been 40 years. Because the sentence was not void, it was not subject to modification under O.C.G.A. § 17-10-1(f). *State v. Blue*, 304 Ga. App. 471, 696 S.E.2d 692 (2010).

Ex post facto clause not violated.

When it was clear from the record that the defendant was sentenced on two separate accusations in 2001 that were not consolidated for trial, under O.C.G.A. § 17-10-7(d), the trial court properly refused to treat the two charges as one offense for purposes of recidivism. Although trial counsel testified that at the time it was the policy of the district attorney’s office to encourage defendants to plead on multiple accusations on the same day and to represent to them that those pleas would only count as one offense for purposes of recidivism, it was the law as provided in the applicable statutes rather than local practices that governed. *Thomas v. State*, 291 Ga. App. 795, 662 S.E.2d 849 (2008).

Construed with § 16-7-1.

Trial court did not abuse the court’s discretion in sentencing a defendant as a recidivist under O.C.G.A. § 17-10-7 because the trial court imposed a modified sentence of 20 years to serve 10 upon the defendant; the sentence, as modified, was proper under O.C.G.A. § 16-7-1(b), the specific sentencing scheme applicable to a defendant convicted of burglary having two prior burglary convictions. *Williams v. State*, 297 Ga. App. 723, 678 S.E.2d 95 (2009).

Construed with § 16-8-14.

Defendant was wrongfully sentenced as

a recidivist under the state's general recidivist statute, O.C.G.A. § 17-10-7(c), rather than the specific recidivist statute applicable to shoplifting offenses, O.C.G.A. § 16-8-14(b)(1)(C) because the record showed that the defendant had three prior felony shoplifting convictions and one prior misdemeanor shoplifting conviction at the time of trial, but there was no evidence of felony convictions for other crimes. *Wester v. State*, 294 Ga. App. 263, 668 S.E.2d 862 (2008).

Construed with U.S. Sentencing Guidelines Manual. — By committing a new crime, defendant lost the benefit of first offender status, and the unadjudicated guilt in connection with the prior state offense was properly considered a prior conviction for purposes of sentencing under the U.S. Sentencing Guidelines Manual, which pursuant to U.S. Sentencing Guidelines Manual § 4A1.2, mandated the imposition of criminal history points, even if doing so undermined the purpose of the Georgia's First Offender Act, O.C.G.A. § 42-8-60 et seq. *United States v. Barner*, 572 F.3d 1239 (11th Cir. 2009).

Exception to finality of conviction rule. — In an escape case, the defendant's prior aggravated assault, robbery, battery, and theft convictions were available to sentence the defendant as a recidivist under O.C.G.A. § 17-10-7(a) because any of the defendant's armed robbery convictions, which were pending at the time the defendant escaped, would support the defendant's being sentenced as a convicted felon under O.C.G.A. § 16-10-52(b). *Allen v. State*, 292 Ga. App. 133, 663 S.E.2d 370 (2008), *aff'd*, 286 Ga. 273, 687 S.E.2d 417 (2009).

Defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7, etc.

Trial court properly dismissed defendant's petition to correct a void sentence, which challenged the imposition of a 60-year recidivist sentence imposed against the defendant for burglary and arson, in violation of O.C.G.A. §§ 16-7-1(a) and 16-7-60(c), respectively, as the state gave notice to the state's intent to have the defendant sentenced as a recidivist under O.C.G.A. § 17-10-7(a)

and (c) and no abuse of the trial court's discretion was shown. *Marshall v. State*, 294 Ga. App. 282, 668 S.E.2d 892 (2008).

Trial court did not abuse the court's discretion in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7(a) and (c) because the defendant had been convicted of at least three prior felonies, and thus, the defendant was required to be sentenced to the longest period of time prescribed for the punishment of the subsequent armed robbery offense and was required to serve the maximum time provided in the sentence of the trial court based upon the defendant's conviction of armed robbery and would not be eligible for parole until the maximum sentence had been served; because life imprisonment was an authorized punishment for a conviction of armed robbery under O.C.G.A. § 16-8-41(b), and because the defendant was sentenced as a recidivist under § 17-10-7(a) and (c), the trial court lacked the discretion to sentence the defendant to a lesser sentence, and it was presumed that the trial court exercised the court's discretion in sentencing the defendant to a period of incarceration, rather than probation, when no evidence to the contrary appeared. *Lester v. State*, 309 Ga. App. 1, 710 S.E.2d 161 (2011).

Trial court did not err by sentencing the defendant as a recidivist because under O.C.G.A. § 17-10-7, the trial court was required to sentence the defendant to life imprisonment without eligibility for parole since the state introduced certified records of the defendant's six prior felony convictions; O.C.G.A. § 17-10-7(a) and (c) must be read together. *Smith v. State*, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Trial court did not err by sentencing the defendant to life without parole as a recidivist because although the trial court failed to mention O.C.G.A. § 17-10-7 when the court orally pronounced sentence, but included § 17-10-7 in the written final disposition, the defendant's sentence did not change; the defendant was still sentenced to life in prison without parole. *Smith v. State*, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Trial court did not err in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7 because the notice of the state's

intent to seek recidivist sentencing was served on defense counsel on the first day of trial prior to the jury being sworn, and certified copies of the convictions were admitted without objection; therefore, any defects or untimeliness in the notice under O.C.G.A. § 17-16-4(a)(5) were waived. *Ross v. State*, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

Counsel was effective in advising on recidivism. — Defendant failed to prove that the defendant was rendered ineffective assistance of counsel based on the defendant's allegation that trial counsel failed to inform the defendant that the state intended to prosecute the defendant as a recidivist as, while the record reflected that trial counsel was confused about the issue and that trial counsel did not know the state intended to prosecute the defendant as a recidivist, trial counsel testified that there was always a possibility of a life sentence for rape and that trial counsel discussed that possibility with the defendant. *Mora v. State*, 295 Ga. App. 641, 673 S.E.2d 23 (2009).

Counsel's failure to inform defendant of the consequences, etc.

Defendant was not entitled to relief under 28 U.S.C. § 2254 because defendant failed to show that defendant was prejudiced by counsel's failure to inform defendant that defendant faced a mandatory life sentence under O.C.G.A. § 17-10-7 where the evidence showed that defendant likely would not have accepted a plea bargain that included a 15 to 25-year sentence because the victim's whereabouts were unknown, and defendant felt that the aggravated assault and armed robbery case against defendant was weak without the victim's testimony. *Carson v. Thompson*, No. 06-12691, 2007 U.S. App. LEXIS 9692 (11th Cir. Apr. 27, 2007) (Unpublished).

A trial court did not err in denying defendant's motion for new trial on the grounds of ineffective assistance of counsel with regard to the defendant's drug-related convictions based on defense counsel failing to advise defendant that the state intended to prosecute defendant as a recidivist since defendant did not testify that defendant would have accepted a plea offer had defendant known

that defendant was facing the prospect of being sentenced as a recidivist; thus, defendant failed to show that counsel's alleged deficiency affected the end result of the case. Furthermore, defendant did not show in the record that the state made or was amenable to any plea negotiations. *Heard v. State*, 291 Ga. App. 550, 662 S.E.2d 310 (2008).

Effect of counsel's inaccurate advice.

Defendant was properly allowed to withdraw a guilty plea to armed robbery, and the probation revocation that this plea triggered was properly reversed, as counsel had been ineffective in misadvising the defendant that the defendant would be eligible for parole if a guilty plea was entered. Instead, under O.C.G.A. § 17-10-7(b)(2), the defendant's second conviction for a serious violent felony mandated a sentence of life imprisonment without the possibility of parole. *Tillman v. Gee*, 284 Ga. 416, 667 S.E.2d 600 (2008).

No ineffective assistance of counsel for failure to object to admission of prior convictions. — With regard to defendant's conviction for distributing cocaine, defendant failed to establish that defendant was rendered ineffective assistance of counsel based on trial counsel failing to adequately challenge the admission of prior convictions at the sentencing hearing as the evidence established that the state gave defendant pre-trial notice that it intended to introduce the convictions at sentencing. Therefore, any objection in that regard would have been futile. *Beck v. State*, 292 Ga. App. 472, 665 S.E.2d 701 (2008), cert. denied, No. S08C1863, 2008 Ga. LEXIS 922 (Ga. 2008).

Appeals.

Because the defendant's argument that the trial court erred in sentencing the defendant under the recidivist statute, O.C.G.A. § 17-10-7, was not raised before the trial court, the defendant waived the right to argue it on appeal. *Boyd v. State*, 302 Ga. App. 455, 691 S.E.2d 325 (2010).

Discretion in imposition of sentence.

Even if a trial court improperly constrained the court's own discretion in applying the recidivist statute, former

O.C.G.A. § 17-10-7(b), any procedural error did not void a defendant's resulting sentence of life imprisonment for armed robbery; thus, the defendant's only remedy was to apply for a writ of habeas corpus. *Brown v. State*, 295 Ga. App. 66, 670 S.E.2d 867 (2008).

Trial court erred in sentencing the defendant as a recidivist to 10 years imprisonment under O.C.G.A. § 17-10-7 for theft by shoplifting in violation of O.C.G.A. § 16-8-14 because the defendant demonstrated that the trial court did not exercise the court's discretion to consider probating or suspending a portion of the sentence after the defendant served one year pursuant to O.C.G.A. § 16-8-14(b)(1)(C). *Holland v. State*, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Although a defendant's trial counsel incorrectly stated that the trial court was required to sentence the defendant to ten years to serve for receiving stolen property, given the defendant's three prior felony convictions, the trial court was presumed to have exercised the court's discretion in imposing the sentence. *Reese v. State*, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

Probating portion of sentence appropriate. — Based upon a defendant's three prior felony convictions, the defendant's sentencing was governed by both O.C.G.A. § 17-10-7(a) and (c), and the trial court was required to apply both. The trial court properly exercised the court's discretion when the court probated a portion of the defendant's sentence. *Jefferson v. State*, 309 Ga. App. 861, 711 S.E.2d 412 (2011).

Notice of intent to use prior convictions is sufficient.

Because state's written notice sufficiently notified defendant of its intent to seek recidivist sentence under O.C.G.A. § 17-10-7 upon conviction of felony obstruction of an officer, and during plea negotiations state again referenced defendant's prior criminal history and reiterated it would seek recidivist punishment, no error occurred in imposing the sentence based on lack of notice. *Evans v. State*, 290 Ga. App. 746, 660 S.E.2d 841 (2008).

Prior convictions listed on an attached

GCIC as aggravation evidence for a defendant's sentencing for theft by deception were sufficient notice that the state intended to seek sentencing as a recidivist under O.C.G.A. §§ 17-10-2 and 17-10-7. *Parks v. State*, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

Defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7(c) because the prosecutor properly served under O.C.G.A. § 17-16-4(a)(5) the state's notice of intent to seek recidivist punishment and introduce evidence of the defendant's prior convictions on defense counsel on the first day of trial; any defects or untimeliness in the notice were waived as certified copies of the convictions were admitted without objection. *Howard v. State*, 297 Ga. App. 316, 677 S.E.2d 375 (2009).

State timely filed the state's notice of intent to use the defendant's prior convictions in aggravation of punishment pursuant to O.C.G.A. § 17-10-7(c) because the state provided the notice four days before trial; the state served and filed the state's notice of intent on March 20, 2008, and trial commenced on March 24. *Shindorf v. State*, 303 Ga. App. 553, 694 S.E.2d 177 (2010).

Proper application of recidivism.

In a felony murder case, as the defendant was convicted of both predicate felonies, armed robbery and burglary, it was within the trial court's discretion to choose to merge the former rather than the latter into the felony murder count for which the defendant was sentenced. Thus, the defendant was not sentenced as a recidivist for felony murder, but was properly sentenced under O.C.G.A. § 17-10-7(c) to 20 years without the possibility of parole for the separate crime of burglary, which did not merge into the conviction for felony murder while in the commission of an armed robbery. *Jackson v. State*, 284 Ga. 484, 668 S.E.2d 700 (2008).

As a violation of O.C.G.A. § 40-5-58(c)(1) (operating a vehicle by a habitual offender whose license has been revoked) is punishable by one to five years' imprisonment, the offense is a felony. Since a defendant had four prior convictions for violations of § 40-5-58(c)(1), the defendant was prop-

erly sentenced as a recidivist under O.C.G.A. § 17-10-7(c). *Hollis v. State*, 295 Ga. App. 529, 672 S.E.2d 487 (2009).

Trial court did not err in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7(a) because the indictment stated that the defendant was in lawful confinement for the 1987 felony convictions, and thus, those convictions were properly admitted at trial to prove felony escape, O.C.G.A. § 16-10-52, for which the defendant could be sentenced up to ten years imprisonment; because the defendant's 1987 conviction for theft by taking was not used by the State as the predicate felony for the offense of felony escape pursuant to § 16-10-52 (b), the 1987 felony theft by taking conviction remained available for sentence enhancement under § 17-10-7 (a), and, inasmuch as the record was silent as to the specific felony conviction the trial court relied upon for sentence enhancement, it had to be presumed that the trial court knew the state of the law and did not use any of the 1987 felony convictions listed in the escape indictment to enhance the defendant's punishment under § 17-10-7(a). *Allen v. State*, 286 Ga. 273, 687 S.E.2d 417 (2009).

There was no error in the trial court's entry of sentence under O.C.G.A. § 17-10-7(d) because the defendant pled guilty to various counts of entering an automobile and theft by receiving, which were alleged in three separate indictments on which three separate orders of sentence were entered; each indictment alleged crimes that occurred on different days. *Baker v. State*, 306 Ga. App. 99, 701 S.E.2d 572 (2010).

No review of sentence within guidelines.

Sentence of ten years to serve for felony shoplifting was upheld; contrary to the defendant's contention, the trial court did not sentence the defendant as a recidivist pursuant to O.C.G.A. § 17-10-7. The trial court's imposition of a sentence within the statutory limits would not be disturbed. *Tyner v. State*, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

No error in imposition of sentence. — As the defendant was not sentenced as a recidivist under O.C.G.A. § 17-10-7(c)

or to the maximum term pursuant to § 17-10-7(a) for a conviction of aggravated assault, in violation of O.C.G.A. § 16-5-21(b), the defendant's claim that the sentencing imposed was improper lacked merit. *Tatum v. State*, 297 Ga. App. 550, 677 S.E.2d 740 (2009).

Sentence was within statutory range. — Trial court did not err in imposing separate sentences for the defendant's two convictions because the sentence was within the statutory range and the law allowed separate and consecutive punishment for separate criminal transactions; O.C.G.A. § 17-10-7 applies to the use of prior convictions to enhance the punishment of repeat offenders, and it does not apply to the trial court's authority to impose separate sentences for a defendant's current convictions of two distinct offenses committed on different dates. *Ross v. State*, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

Sentence not cruel and unusual. — Trial court did not commit cruel and unusual punishment in sentencing a defendant to two consecutive terms of 20 years to serve in confinement for two burglary convictions under O.C.G.A. § 16-7-1(a), based on the defendant's recidivism under O.C.G.A. § 17-10-7(c), because the sentence was within statutory limits. *Hight v. State*, 302 Ga. App. 826, 692 S.E.2d 69 (2010).

Cited in *Dunagan v. State*, 283 Ga. 501, 661 S.E.2d 525 (2008); *Hooks v. State*, 284 Ga. 531, 668 S.E.2d 718 (2008), overruled on other grounds, 287 Ga. 192, 695 S.E.2d 244 (2010); *Hampton v. State*, 294 Ga. App. 857, 670 S.E.2d 502 (2008); *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008); *Cobb v. State*, 309 Ga. App. 70, 709 S.E.2d 9 (2011).

Allegation and Proof of Prior Convictions

Requirements of indictment for recidivist punishment.

With regard to a defendant's conviction for burglary, the trial court properly sentenced the defendant under O.C.G.A. § 17-10-7 to 20 years, with 10 years to serve in prison without parole and the remainder of the sentence suspended on the condition that the defendant not vio-

late any laws, as a result of three prior felony convictions because the defendant waived any claimed error by failing to challenge the sentence. However, even if the error had not been waived, the recidivist sentence was proper since the state proved all four of the convictions that were listed in the indictment and notices and, although the trial court stated that the court was not relying on the defendant's robbery convictions in imposing a sentence, there was no reason those convictions could not be used to support the sentence. *Battise v. State*, 295 Ga. App. 833, 673 S.E.2d 262 (2009), cert. denied, No. S09C0917, 2009 Ga. LEXIS 369 (Ga. 2009).

Trial court did not err by sentencing the defendant as a recidivist since the defendant's convictions for selling cocaine and possessing a firearm as a convicted felon were separate convictions and were not merged for sentencing purposes. The trial court's use of the same waiver form with regard to the defendant's guilty pleas did not negate the fact that the convictions were separate and were not consolidated. *Crutchfield v. State*, 295 Ga. App. 490, 672 S.E.2d 467 (2009).

Recidivism evidence used to enhance sentence.

A trial court properly denied defendant's motion complaining of the imposition of recidivist sentencing under O.C.G.A. § 17-10-7(c) as defendant did not establish that the trial court erred in considering any of defendant's three prior felony convictions for purposes of recidivist sentencing. Defendant's argument that a third prior conviction was not final since it still involved a period of probation that had not yet been discharged or revoked was found meritless as the prior conviction at issue did not involve a first offender sentence. *Land v. State*, 291 Ga. App. 617, 662 S.E.2d 368 (2008).

Trial court correctly sentenced a defendant to serve life without the possibility of parole because the defendant was a four-time recidivist and the maximum sentence for rape was life in prison. Further, the state provided the defendant with notice prior to trial that the state would seek to have the defendant sentenced as a recidivist, pursuant to

O.C.G.A. § 17-10-7. *Hall v. State*, 292 Ga. App. 544, 664 S.E.2d 882 (2008), cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

Trial court erred in using the defendant's August 2001 felony convictions to sentence the defendant as a recidivist under O.C.G.A. § 17-10-7(a) because, at the time of the defendant's sentencing for escape in October 2001, the August 2001 convictions were unavailable for recidivist treatment since they were pending on appeal; the defendant was found guilty and sentenced on armed robberies in August 2001, the defendant appealed those convictions, and the convictions were affirmed three years later. *Allen v. State*, 286 Ga. 273, 687 S.E.2d 417 (2009).

Allegation and proof of prior convictions generally.

Trial court erred in sentencing the defendant as a recidivist pursuant to O.C.G.A. § 17-10-7(c) because the state did not introduce any evidence that the defendant had previously pled guilty or been convicted of any crime. *Dobbs v. State*, 302 Ga. App. 628, 691 S.E.2d 387 (2010).

Defendant sentenced to life in prison without parole, under O.C.G.A. §§ 16-13-30(d) and 17-10-7(c), based on the defendant's prior convictions stemming from guilty pleas, was not entitled to habeas relief on the basis of the defendant's trial counsel's failure to review the transcripts of the defendant's prior plea colloquies because: (1) no per se rule required counsel to review the transcripts; and (2) counsel otherwise adequately investigated the validity of the prior convictions. *Barker v. Barrow*, 290 Ga. 711, 723 S.E.2d 905 (2012).

State did not "use up" prior felony conviction to prove element of crime.

— Trial court's consideration of a prior felony conviction in imposing punishment under O.C.G.A. § 17-10-7(c) was proper because the state did not "use up" evidence of the prior felony conviction to establish a charge of firearm possession by a convicted felon charge; instead, the state only offered evidence of the defendant's previous felony indictment, not the conviction. *Thompson v. State*, 294 Ga. App. 768, 670 S.E.2d 226 (2008), cert.

denied, No. S09C0482, 2009 Ga. LEXIS 252 (Ga. 2009).

Proof of validity of prior guilty plea.

Trial court did not err in considering the defendant's prior guilty plea in sentencing the defendant as a recidivist after the defendant was convicted of felony theft by taking because the State, by tendering the certified copy of the plea, met its initial burden of proving that the defendant had entered the guilty plea. *Sheppard v. State*, 300 Ga. App. 631, 686 S.E.2d 295 (2009).

Offenses not consolidated for trial.

— Trial court correctly concluded that a defendant's three prior offenses were not consolidated for trial under O.C.G.A. § 17-10-7(d). The three prior crimes involved different victims, and each conviction had a separate case number, indictment, and sentencing order. *Barbee v. State*, 308 Ga. App. 322, 707 S.E.2d 550 (2011).

Prior out-of-state convictions.

Defense counsel was not ineffective for failing to object to the trial court's use of prior felonies defendant committed in California to sentence him as a recidivist under O.C.G.A. § 17-10-7(c), as the elements of Cal. Health & Safety Code §§ 11054(f), 11350(a) (possession of cocaine) were sufficiently similar to those of O.C.G.A. §§ 16-13-26(1)(D), 16-13-30(c); and the elements of Cal. Penal. Code § 211 (robbery) were sufficiently similar to those of O.C.G.A. § 16-8-40. *Williams v. State*, 296 Ga. App. 270, 674 S.E.2d 115 (2009).

Trial court did not err in sentencing the defendant as a recidivist because the records of an Alabama conviction showed that the defendant pled guilty to the offense of burglary in the third degree and received a sentence of four years imprisonment; the elements of the crime as charged in the Alabama indictment were similar to the elements required to commit the crime under O.C.G.A. § 16-7-1. *Wells v. State*, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

Concurrent sentence entered on same day not consolidated.

Although the latter two of a defendant's prior felonies were entered on the same day and resulted in the imposition of con-

current terms of imprisonment, as the sentences were based on burglaries that occurred on different dates and resulted in separate indictments against the defendant, the sentences were not deemed consolidated for trial under O.C.G.A. § 17-10-7(d), such that they counted as separate felony offenses for purposes of recidivist sentencing under § 17-10-7(c). *McSears v. State*, 292 Ga. App. 804, 665 S.E.2d 890 (2008).

O.C.G.A. § 17-10-7(d) did not require the imposition of concurrent sentences for a defendant's convictions of armed robbery and aggravated assault. O.C.G.A. § 16-1-7 authorized separate sentences for the two crimes charged in the same prosecution because the crimes were not included offenses. *Redden v. State*, 294 Ga. App. 879, 670 S.E.2d 552 (2008).

Use of prior convictions for guilt innocence phase and sentencing phase.

Because the defendant was acquitted of possession of a firearm by a convicted felon, two prior felony convictions were not used both to support a conviction on that charge and to enhance the defendant's burglary sentence under O.C.G.A. § 17-10-7(c). *Raymond v. State*, 298 Ga. App. 549, 680 S.E.2d 598 (2009), cert. denied, No. S09C1791, 2010 Ga. LEXIS 47 (Ga. 2010).

Defendant waived defendant's objection to the trial court's consideration of a particular conviction in aggravation of sentencing under the recidivist statute, O.C.G.A. § 17-10-7, when the state had already used that conviction in support of the charge of possession of a firearm by a convicted felon because the defendant failed to object at sentencing to the exhibit containing the conviction. *Thomas v. State*, 305 Ga. App. 801, 701 S.E.2d 202 (2010).

Failure to object to the State's evidence of prior convictions. — A defendant's claim that the defendant should not have been sentenced as a recidivist under O.C.G.A. § 17-10-7(c) was rejected on appeal because defense counsel failed to object to the admissibility of the defendant's prior felony convictions at the presentencing hearing. *Williams v. State*, 301 Ga. App. 731, 688 S.E.2d 650 (2009).

Sentence was not enhanced, nor was defendant sentenced as a recidivist. — With regard to a defendant's conviction for trafficking in cocaine, the trial court did not improperly consider similar transaction evidence of being arrested for trafficking in cocaine in 2004, as well as convictions that were reversed on appeal, in aggravation of the defendant's sentence

because, although the state filed a notice of intent to seek recidivist punishment, it did not offer certified copies of any convictions in evidence at sentencing and the defendant was not sentenced as a recidivist. *Celestin v. State*, 296 Ga. App. 727, 675 S.E.2d 480 (2009), cert. denied, No. S09C1200, 2009 Ga. LEXIS 340 (Ga. 2009).

17-10-8. Requirement of payment of fine as condition precedent to probation; rebate or refund of fine upon revocation of probation.

JUDICIAL DECISIONS

Imposition of \$5,000 fine proper for drug possession. — When a defendant was convicted of possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30 and sentenced to the mandatory minimum of 10 years' imprisonment, plus 30 years on probation, the trial court did not err in imposing a \$5,000 fine as a condition of probation. O.C.G.A. § 17-10-8 permitted a trial court to impose a fine as a condition of probation. *Marshall v. State*, 291 Ga. App. 284, 661 S.E.2d 662 (2008).

during incarceration was void. — Defendant's sentence for cocaine possession requiring the defendant to begin making monthly payments on fines, fees, and court costs during incarceration was a punishment that the law did not allow, and therefore was void. Pursuant to O.C.G.A. § 17-10-8, the defendant could only be ordered to make such payments as a condition of probation. *Crane v. State*, 302 Ga. App. 422, 691 S.E.2d 559 (2010).

Cited in *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Order for defendant to pay fines

17-10-9.1. Voluntary surrender to county jail or correctional institution; release of defendant.

(a) When a defendant who pleads *nolo contendere* or guilty or is convicted of an offense against the laws of this state other than:

- (1) Treason;
- (2) Murder;
- (3) Rape;
- (4) Aggravated sodomy;
- (5) Armed robbery;
- (6) Aircraft hijacking and hijacking of a motor vehicle;
- (7) Aggravated child molestation;

(8) Manufacturing, distributing, delivering, dispensing, administering, selling, or possessing with intent to distribute any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II;

(9) Violating Code Section 16-13-31, relating to trafficking in cocaine or marijuana;

(10) Kidnapping, arson, or burglary in any degree if the person, at the time such person was charged, has previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (9) of this subsection;

(11) Child molestation;

(12) Robbery;

(13) Aggravated assault; or

(14) Voluntary manslaughter

is sentenced to a term of confinement in a county jail or a correctional institution operated by or under the jurisdiction and supervision of the Department of Corrections, the sentencing judge may release the defendant pending the defendant's surrendering to a county jail or to a correctional institution designated by the Department of Corrections as authorized in this Code section. The sentencing court may release the defendant on bond or may release the defendant on the defendant's personal recognizance. This Code section shall not be construed to limit the court's authority in prescribing conditions of probation.

(b) Any defendant who has been released on bond and who has complied with all of the conditions of the bond and any other defendant who, in the opinion of the sentencing judge, is deemed worthy of the procedure to surrender voluntarily, may be eligible to participate in the program. However, the sentencing judge shall be the sole and final arbiter concerning eligibility and the defendant shall have no right to appeal such decision.

(c) When a defendant submits a request to the sentencing judge to be allowed to surrender voluntarily to a county jail or a correctional facility, the judge may consider the request and if, taking into the consideration the crime for which the defendant is being sentenced, the history of the defendant, and any other factors which may aid in the decision, the judge determines that the granting of the request will pose no threat to society, the defendant shall be remanded to the supervision of a probation officer by the judge and ordered to surrender voluntarily to a county jail designated by the court or to a correctional institution as thereafter designated by the Department of Corrections. The surrender date shall be a date thereafter specified as provided in subsection (d) of this Code section. The sentence of any defendant who is released pursuant to this Code section shall not begin to run until such person surrenders to the facility designated by the court or by the

department, provided that such person will receive credit toward his sentence for time spent in confinement awaiting trial as provided in Code Section 17-10-11.

(d) In the event the defendant is ordered to surrender voluntarily to a county jail, the court shall designate the date on which the defendant shall surrender, which date shall not be more than 120 days after the date of conviction. When the sentencing judge issues an order requiring a defendant to surrender voluntarily to a correctional institution, the Department of Corrections shall authorize the commitment and designate the correctional institution to which the defendant shall report and the date on which the defendant is to report, which date shall not be more than 120 days after the date of conviction. Upon such designation, the department shall notify the supervising probation officer who shall notify the defendant accordingly. Subsistence and transportation expenses en route to the correctional institution shall be borne by the defendant.

(e) The provisions of this Code section shall not apply to any defendant convicted of a capital felony.

(f) If the defendant fails to surrender voluntarily as directed and required, the defendant may be charged with the offense of bail jumping pursuant to subsection (a) of Code Section 16-10-51 or the offense of escape pursuant to paragraph (3) of subsection (a) of Code Section 16-10-52 and, if convicted of such crimes, shall be punished as provided by law; or may be cited for contempt of court by the sentencing judge and, if convicted of contempt, the defendant shall be punished as provided in Code Section 15-6-8.

(g) The Department of Corrections is authorized and directed to promulgate such rules and regulations as may be necessary to effectuate the purposes of this Code section. (Code 1981, § 17-10-9.1, enacted by Ga. L. 1989, p. 607, § 1; Ga. L. 1994, p. 1625, § 6; Ga. L. 2012, p. 899, § 8-10/HB 1176.)

The 2012 amendment, effective July 1, 2012, inserted “in any degree” twice in paragraph (a)(10). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after

that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

17-10-10. Concurrent sentences.**JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION****General Consideration**

Constitutionality. — Trial court erred in determining that a defendant's challenge to the constitutionality of O.C.G.A. § 17-10-10 was waived; however, the Supreme Court of Georgia rejected the defendant's challenges to consecutive sentences imposed under the statute on due process grounds, equal protection grounds, Sixth Amendment grounds, and rule of lenity grounds. *Rooney v. State*, 287 Ga. 1, 690 S.E.2d 804, cert. denied, U.S. , 131 S. Ct. 117, 178 L. Ed. 2d 72 (2010).

Consecutive sentences allowed.

Defendant's sentence of 20 years to serve for armed robbery, 20 years

probation for aggravated assault, and 5 years probation for possession of a firearm during the commission of a felony, each to run consecutively, did not constitute cruel and unusual punishment in violation of the Eighth Amendment because the trial court's sentence fell within the statutory range of punishment, O.C.G.A. §§ 16-5-21(b), 16-8-41(b), and 16-11-106(b); under O.C.G.A. § 17-10-10(a) it was within the trial court's discretion to order that the defendant's sentences on armed robbery and aggravated assault run consecutively. *McKenzie v. State*, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

Cited in *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

RESEARCH REFERENCES

ALR. — Construction and application of U.S.S.G. § 5g1.3(b), requiring federal sentence to run concurrently to undischarged state sentence when state sentence has been fully taken into account

in determining offense level for federal offense — particular events preceding federal sentence and sentencing credit, 32 ALR Fed. 2d 191.

17-10-11. Credit for time in confinement awaiting trial or resulting from a court order — Granting generally; use in determining parole eligibility; applicability of Code section.

(a) Each person convicted of a crime in this state shall be given full credit for each day spent in confinement awaiting trial and for each day spent in confinement, in connection with and resulting from a court order entered in the criminal proceedings for which sentence was imposed, in any institution or facility for treatment or examination of a physical or mental disability. The credit or credits shall be applied toward the convicted person's sentence and shall also be considered by parole authorities in determining the eligibility of the person for parole.

(b) This Code section applies to sentences for all crimes, whether classified as violations, misdemeanors, or felonies, and to all courts having criminal jurisdiction located within the boundaries of this state.

(Ga. L. 1970, p. 692, §§ 1, 2; Ga. L. 1972, p. 742, § 1; Ga. L. 2010, p. 1147, § 9/HB 1104.)

The 2010 amendment, effective July 1, 2010, deleted “, except juvenile courts” following “state” at the end of subsection (b).

JUDICIAL DECISIONS

Credit improperly denied.

Because O.C.G.A. § 17-10-11(a) provided that defendant was entitled to credit for the full time served prior to sentencing in connection with the charges, because the Department of Corrections apparently relied upon the trial court’s handwritten notation in calculat-

ing defendant’s sentencing credit, and as the notation was a gratuitous misdirection that had the effect of improperly taking credit away from the defendant, the trial court erred in denying the defendant’s motion to correct the error. *Cochran v. State*, No. A11A1601, 2012 Ga. App. LEXIS 81 (Jan. 31, 2012).

17-10-12. Credit for time in confinement awaiting trial or resulting from a court order — Affidavit specifying number of days spent in confinement; disposition of affidavit; granting of credit to defendant.

JUDICIAL DECISIONS

Procedure for claiming credits.

Trial court properly denied defendant’s motion to modify defendant’s sentence; under O.C.G.A. § 17-10-12, it was the duty of department of corrections, not trial court, to award credit for time served prior to trial; if the defendant was ag-

grieved by department’s calculations, defendant should have sought relief from department, then pursued mandamus or injunctive relief if defendant was not satisfied. *Anderson v. State*, 290 Ga. App. 890, 660 S.E.2d 876 (2008).

17-10-15. AIDS transmitting crimes; requiring defendant to submit to HIV test; report of results.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) A victim or the parent or legal guardian of a minor or incompetent victim of a sexual offense as defined in Code Section 31-22-9.1 or other crime which involves significant exposure as defined by subsection (g) of this Code section may request that the agency responsible for prosecuting the alleged offense request that the person arrested for such offense submit to a test for the human immunodeficiency virus and consent to the release of the test results to the victim. If the person so arrested declines to submit to such a test, the judge of the superior court in which the criminal charge is pending, upon a showing of probable cause that the person arrested for the offense committed the alleged crime and that significant exposure occurred, may order the test

to be performed in compliance with the rules adopted by the Department of Public Health. The cost of the test shall be borne by the victim or by the arrested person, in the discretion of the court.

(c) Upon a verdict or plea of guilty or a plea of *nolo contendere* to any AIDS transmitting crime, the court in which that verdict is returned or plea entered shall require the defendant in such case to submit to an HIV test within 45 days following the date of such verdict or plea. The clerk of the court in such case shall mail, within three days following the date of that verdict or plea, a copy of that verdict or plea to the Department of Public Health.

(d) The Department of Public Health, within 30 days following receipt of the court's order under subsection (b) of this Code section or within 30 days following receipt of the copy of the verdict or plea under subsection (c) of this Code section, shall arrange for the HIV test for the person required to submit thereto.

(e) Any person required under this Code section to submit to the HIV test who fails or refuses to submit to the test arranged pursuant to subsection (d) of this Code section shall be subject to such measures deemed necessary by the court in which the order was entered, verdict was returned, or plea was entered to require involuntary submission to the HIV test, and submission thereto may also be made a condition of suspending or probating any part of that person's sentence for the AIDS transmitting crime.

(f) If a person is required by this Code section to submit to an HIV test and is thereby determined to be infected with HIV, that determination and the name of the person shall be reported to:

(1) The Department of Public Health, which shall disclose the name of the person as necessary to provide counseling to each victim of that person's AIDS transmitting crime if that crime is other than one specified in subparagraph (a)(3)(J) of Code Section 31-22-9.1 or to any parent or guardian of any such victim who is a minor or incompetent person;

(2) The court which ordered the HIV test, which court shall make that report a part of that person's criminal record. That report shall be sealed by the court; and

(3) The officer in charge of any penal institution or other facility in which the person has been confined by order or sentence of the court for purposes of enabling that officer to confine the person separately from those not infected with HIV.

(g) For the purpose of subsection (b) of this Code section, "significant exposure" means contact of the victim's ruptured or broken skin or mucous membranes with the blood or body fluids of the person arrested

for such offense, other than tears, saliva, or perspiration, of a magnitude that the Centers for Disease Control and Prevention have epidemiologically demonstrated can result in transmission of the human immunodeficiency virus.

(h) The state may not use the fact that a medical procedure or test was performed on a person under this Code section or use the results of the procedure or test in any criminal proceeding arising out of the alleged offense. (Code 1981, § 17-10-15, enacted by Ga. L. 1988, p. 1799, § 4; Ga. L. 1991, p. 974, § 1; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214; Ga. L. 2012, p. 775, § 17/HB 942.)

The 2009 amendment, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” throughout this Code section.

The 2011 amendment, effective July 1, 2011, substituted “Department of Public Health” for “Department of Community Health” throughout this Code section.

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, substituted “Centers for Disease Control and Prevention” for “Centers for Disease Control” in subsection (g).

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 147 (2011).

17-10-16. Sentence to imprisonment for life without parole authorized; ineligibility for parole or leave programs.

JUDICIAL DECISIONS

Cited in *State v. Velazquez*, 283 Ga. 206, 657 S.E.2d 838 (2008).

17-10-16.1. Seeking death penalty not prerequisite to life without parole sentence.

A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state. (Code 1981, § 17-10-16.1, enacted by Ga. L. 2011, p. 752, § 17/HB 142.)

Effective date. — This Code section became effective May 13, 2011. reflective of uncodified provisions from Ga. L. 2009, p. 223, § 10.

Editor’s notes. — This Code section is

17-10-17. Sentencing of defendants guilty of crimes involving bias or prejudice; circumstances; parole.

JUDICIAL DECISIONS

Cited in *Laseter v. State*, 294 Ga. App. 12, 668 S.E.2d 495 (2008).

ARTICLE 2

DEATH PENALTY GENERALLY

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary in any degree or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or firefighter while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another; or

(11) The offense of murder, rape, or kidnapping was committed by a person previously convicted of rape, aggravated sodomy, aggravated child molestation, or aggravated sexual battery.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, § 27-2534.1, enacted by Ga. L. 1973, p. 159, § 3; Ga. L. 1996, p. 748, § 15; Ga. L. 2002, p. 660, § 4; Ga. L. 2002, p. 1259, § 11; Ga. L. 2006, p. 379, § 22/HB 1059; Ga. L. 2012, p. 899, § 8-11/HB 1176.)

The 2012 amendment, effective July 1, 2012, inserted “in any degree” in paragraph (b)(2). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a

subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Law reviews. — For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008). For annual survey on death penalty law, see 61 Mercer L. Rev. 99 (2009).

For note and comment, “Hope for the Best and Prepare for the Worst: The Capital Defender’s Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials,” see 23 Ga. St. U. L. Rev. 995 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

MITIGATING CIRCUMSTANCES

AGGRAVATING CIRCUMSTANCES

1. IN GENERAL

3. CRIME COMMITTED WHILE ENGAGED IN COMMISSION OF OTHER CRIMES

4. OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE, OR INHUMAN CIRCUMSTANCES

5. MURDER OF PEACE OFFICER, CORRECTIONS EMPLOYEE, OR FIREMAN FOR PURPOSE OF AVOIDING, ARREST OR CUSTODY

General Consideration

Constitutionality.

O.C.G.A. § 17-10-30(b)(8) bears a rational relationship to the legitimate state purposes of providing deterrence of possible harm to peace officers and, thus, of protecting officers. Accordingly, the statutory aggravating circumstance does not violate equal protection under U.S. Const., amend. XIV or Ga. Const. 1983, Art. I, Sec. I, Para. II. *Fair v. State*, 288 Ga. 244, 702 S.E.2d 420 (2010).

Defendants equal protection challenge under U.S. Const., amend. XIV and Ga. Const. 1983, Art. I, Sec. I, Para. II failed since the defendants were similarly situated to the defendants against whom the state sought the death penalty under one or more of the statutory aggravating circumstances as provided in O.C.G.A. § 17-10-30(b). The trial court did not err in refusing to apply strict scrutiny analysis in considering the defendants' equal protection challenge on the basis that the punishment prescribed by the criminal statute involves an interference with a fundamental right. The proper inquiry was whether the behavior involved a fundamental right, and the obvious answer was that the behavior did not. *Fair v. State*, 288 Ga. 244, 702 S.E.2d 420 (2010).

No ineffective assistance of counsel. — A prisoner's counsel was not ineffective in not developing mitigating circumstances after receiving notice that the state was seeking the death penalty under O.C.G.A. § 17-10-30(7) because the prisoner had requested that counsel not contact relatives and did not provide counsel with leads for such information. Further, counsel was not required under Ga. Unif. Super. Ct. R. 31.4 and *Strickland* to request an independent evaluation as to the prisoner's competency in that such a request would not have accomplished counsel's goal of a determination of whether there was a psychological or neurological explanation for the prisoner's behavior on the night of the murder. *Newland v. Hall*, 527 F.3d 1162 (11th Cir. 2008), cert. denied, U.S. , 129 S. Ct. 1336, 173 L. Ed. 2d 607 (2009).

Trial court was not authorized to sentence defendant to life in prison without possibility of parole. — Upon certiorari review before the Supreme Court of Georgia, the Court of Appeals of Georgia properly vacated a rape sentence entered by the trial court, holding that the defendant was incorrectly sentenced to a term of life in prison without the possibility of parole, as the state failed to give notice that it intended to seek the death penalty, and the trial court failed to find that any aggravating circumstance under O.C.G.A. § 17-10-30 existed, pursuant to O.C.G.A. § 17-10-32.1; thus, the trial court was not authorized to sentence the defendant to life in prison without the possibility of parole. *State v. Velazquez*, 283 Ga. 206, 657 S.E.2d 838 (2008).

Opening statement at penalty phase of capital case. — Sentencing phase of a death penalty trial is a "criminal matter" and therefore defendant is entitled to make an opening statement and the trial court erred in refusing to honor defense counsel's choice as to when to make the statement; however the error was harmless in light of the straightforward mitigation theory. *O'Kelley v. State*, 284 Ga. 758, 670 S.E.2d 388 (2008).

Cited in *Hall v. Terrell*, 285 Ga. 448, 679 S.E.2d 17 (2009).

Mitigating Circumstances

Mitigating circumstances to be presented to a jury in a Georgia death penalty case, etc.

Georgia law instructs the judge and jury in a capital case to consider any mitigating circumstances in determining whether to impose the death penalty. *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011).

Aggravating Circumstances

1. In General

Failure of one aggravating circumstance does not invalidate others.

The O.C.G.A. § 17-10-30(b)(10) statutory aggravating circumstance found as to each of two murder victims was not sup-

ported by the evidence based on the state's argument that killing a witness to a crime was a means of avoiding, interfering with, or preventing lawful arrest, and that once a defendant obtained the victims' ATM cards and PINs, the defendant murdered the victims because the defendant knew that the defendant would be apprehended if the victims were left alive. However, the invalidation of this statutory aggravating circumstance did not affect the death sentences imposed. *Humphreys v. State*, 287 Ga. 63, 694 S.E.2d 316, cert. denied, U.S. , 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010).

Erroneous instruction not reversible error.

Because O.C.G.A. § 17-10-30(b)(2) sets forth only one statutory aggravating circumstance, the trial court erred by using a verdict that suggested otherwise; however, the error was harmless because the death penalty would still have been authorized if the several overlapping findings had been merged, and the jury was not instructed to weigh the number of statutory aggravating circumstances but, instead, was properly charged that the jury could impose a sentence less than death for any or no reason. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

3. Crime Committed While Engaged in Commission of Other Crimes

Murder committed during burglary.

Considering the two murders committed by the defendant, the Supreme Court of Georgia determined that the sentences of death were not excessive or disproportionate to the penalty imposed in similar cases as the defendant murdered a parent and a young child for the purpose of robbing a home; the defendant made the child turn the power back on so that the defendant could see the parent since the parent was still indicating signs of life and the defendant wanted to see to complete the murder; the defendant boasted of raping the child before cutting the child's throat; and, knowing that the child was still alive, the defendant set the house on fire, leav-

ing the pair to burn. *O'Kelley v. State*, 284 Ga. 758, 670 S.E.2d 388 (2008).

Evidence sufficient to show murder committed along with other crimes.

There were sufficient aggravating circumstances to support the defendant's sentencing to life imprisonment without the possibility of parole based on the evidence establishing that the defendant and a codefendant shot and killed a convenience store clerk while the pair were robbing the store. *McDougal v. State*, 284 Ga. 427, 667 S.E.2d 592 (2008).

Kidnapping with bodily injury is viable aggravating circumstance.

Trial court did not err in sentencing the defendant to death for murder because the evidence was sufficient to support the trial court's finding of the existence of a statutory aggravating circumstance based on kidnapping with bodily injury beyond a reasonable doubt under O.C.G.A. § 17-10-30(b)(2) since the stab wound to the victim's thigh and the victim's strangulation constituted bodily injuries sufficient to complete this statutory aggravating circumstance; the defendant pled guilty to the offense of kidnapping with bodily injury, and the evidence presented at the sentencing trial correlated with the definition of kidnapping. *Loyd v. State*, 288 Ga. 481, 705 S.E.2d 616 (2011), cert. dismissed, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances

Defendant who tortures a victim before killing the victim, etc.

Although the defendant could not be convicted of both malice murder and three counts of aggravated battery when the same actions by the defendant served as the basis for both the murder and the battery offenses, the jury was nevertheless authorized to find the statutory aggravating circumstances set forth in O.C.G.A. § 17-10-30(b)(2) and the aggravated battery portion of the (b)(7) circumstance because the victim's death was not instantaneous; likewise, the jury's finding of torture was supported by the evidence that the victim's death was not instantaneous but was preceded by serious sexual

abuse, as well as the serious physical abuse that constituted the aggravated batteries. Furthermore, the shocking and vicious nature of the victim's murder by stomping and kicking authorized the jury to find that the murder was outrageously or wantonly vile, horrible, or inhuman; thus, the evidence was sufficient to support the jury's findings beyond a reasonable doubt of both the paragraph (b)(2) and (b)(7) statutory aggravating circumstances. *Ledford v. State*, 289 Ga. 70, 709 S.E.2d 239, cert. denied, U.S. , 132 S. Ct. 556, 181 L. Ed. 2d 401 (2011).

Aggravating circumstance found beyond a reasonable doubt.

Evidence adduced at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of statutory aggravating circumstances because the jury found the existence of the following statutory aggravating circumstances beyond a reasonable doubt; the murder was committed while the defendant was engaged in the commission of the capital felony of armed robbery, and the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind: (1) the defendant initially attacked the victim, who was disabled, in the confined area of a bathroom, where the defendant struck the victim multiple times shortly after the victim emerged from the shower; (2) the defendant continued the attack on the victim even as the victim fell to the floor; (3) the evidence showed that the defendant struck the victim in the head with a hammer and a metal stool at least 12 to 14 times; and (4) the defendant acted for the purpose of obtaining money the victim had just received from cashing the victim's disability check. *Arrington v. State*, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, U.S. , 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Trial court did not err in sentencing the defendant to death for murder because the evidence supported the trial court's finding beyond a reasonable doubt that the murder was outrageously or wantonly vile, horrible, or inhuman in that the murder involved torture to the victim and the depravity of mind of the defendant; the defendant pled guilty to the offenses of cruelty to children, aggravated sodomy, and enticing a child for indecent purposes, and the state presented evidence that the defendant took the three-year-old victim from the defendant's home to an abandoned trailer late at night for the purpose of having sex with the defendant. *Loyd v. State*, 288 Ga. 481, 705 S.E.2d 616 (2011), cert. dismissed, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Instruction proper. — Because the O.C.G.A. § 17-10-30(b)(7) statutory aggravating circumstance was not used as an unlawful "catchall" justification for the death penalty, the trial court properly gave an instruction regarding that statutory aggravating circumstance recommended by the supreme court. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

**5. Murder of Peace Officer,
Corrections
Employee, or Fireman for Purpose
of
Avoiding, Arrest or Custody**

Knowledge that victim was peace officer or other official. — The O.C.G.A. § 17-10-30(b)(8) statutory aggravating circumstance does not require knowledge on the part of the defendant that the victim was a peace officer or other designated official engaged in the performance of official duties. *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008).

17-10-30.1. Imprisonment for life without parole; finding of statutory aggravating circumstance required; duties of judge and jury.

Repealed by Ga. L. 2009, p. 223, § 4/SB 13, effective April 29, 2009.

Editor's notes. — This Code section was based on Code 1981, § 17-10-30.1, enacted by Ga. L. 1993, p. 1654, § 4.

Ga. L. 2009, p. 223, § 8, not codified by the General Assembly, provides that: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand."

Ga. L. 2009, p. 223, § 9, not codified by the General Assembly, provides that: "Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act."

Ga. L. 2009, p. 223, § 10, not codified by the General Assembly, provides that: "A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state." Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a), not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009, and the amendments by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

17-10-31. Requirement of jury finding of aggravating circumstance and recommendation of death penalty prior to imposition; arguments of counsel during sentencing phase; jury instructions; actions of judge in event of failure to reach unanimous verdict.

(a) Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the accused to death. Where a statutory aggravating circumstance is not found or where a statutory circumstance is found but a recommendation of death is not made, the jury shall decide whether to recommend a sentence of life imprisonment without parole or life imprisonment with the possibility of parole. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the accused to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. This Code section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

(b) During the sentencing phase before a jury, counsel for the state and the accused may present argument and the trial judge may instruct the jury:

(1) That “life without parole” means that the accused shall be incarcerated for the remainder of his or her natural life and shall not be eligible for parole unless such person is subsequently adjudicated to be not guilty of the offense for which he or she was sentenced; and

(2) That “life imprisonment” means that the accused will be incarcerated for the remainder of his or her natural life but will be eligible for parole during the term of such sentence.

(c) If the jury is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole. (Code 1933, § 26-3102, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 809, § 1; Ga. L. 1973, p. 159, § 7; Ga. L. 2009, p. 223, § 5/SB 13.)

The 2009 amendment, effective April 29, 2009, designated the existing provisions as subsection (a); in subsection (a), substituted “accused” for “defendant” in the second and fourth sentences and substituted the present third sentence for the former third sentence which read: “Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law”; and added subsections (b) and (c). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2009, p. 223, § 8, not codified by the General Assembly, provides that: “Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand.”

Ga. L. 2009, p. 223, § 9, not codified by the General Assembly, provides that: “Except as provided in Section 8 of this Act, the amendment or repeal of a Code section

by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act.”

Ga. L. 2009, p. 223, § 10, not codified by the General Assembly, provides that: “A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state.” Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a), not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009, and the amendments by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b), not codified by the General Assembly, provides that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

Law reviews. — For note, “Evaluating the Constitutionality of Proposals to Allow Non-Unanimous Juries to Impose the Death Penalty in Georgia,” see 29 Ga. St. U. L. Rev. 1003 (2010).

JUDICIAL DECISIONS

Evidence of parole eligibility. — Trial court did not err by refusing to allow the defendant to present evidence and arguments about the likely date of parole eligibility if the defendant was sentenced to life with the possibility of parole for the murders because such evidence and argument was generally not permitted prior to the addition of life without parole as a sentencing option. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Life sentence not required if first jury did not reach penalty phase.

Trial court did not err in giving an Allen charge to a jury considering the death penalty, overruling *Legare v. State*, 250 Ga. 875 (1983), because the statement that a unanimous verdict was required was technically correct, although it would be better practice to omit that phrase when giving an Allen charge in the penalty phase of a capital case. *Humphreys v. State*, 287 Ga. 63, 694 S.E.2d 316, cert. denied, U.S. , 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010).

17-10-31.1. Requirement of jury finding of aggravating circumstance and recommendation of sentence of death or life without parole; duties of judge; jury instruction on meaning of “life without parole” and “life imprisonment.”

Repealed by Ga. L. 2009, p. 223, § 6/SB 13, effective April 29, 2009.

Editor’s notes. — This Code section was based on Code 1981, § 17-10-31.1, enacted by Ga. L. 1993, p. 1654, § 5.

Ga. L. 2009, p. 223, § 8, not codified by the General Assembly, provides that: “Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand.”

Ga. L. 2009, p. 223, § 9, not codified by the General Assembly, provides that: “Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act.”

Ga. L. 2009, p. 223, § 10, not codified by the General Assembly, provides that: “A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state.” Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a), not codified by the General Assembly, provides, in part, that the law as set forth in Section 4 of this Act as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009.

Ga. L. 2009, p. 223, § 11(b), not codified by the General Assembly, provides that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

17-10-32.1. Sentencing of person subject to death penalty or life without parole upon plea of guilty; duties of judge.

Repealed by Ga. L. 2009, p. 223, § 7/SB 13, effective April 29, 2009.

Editor's notes. — This Code section was based on Code 1981, § 17-10-32.1, enacted by Ga. L. 1993, p. 1654, § 6.

Ga. L. 2009, p. 223, § 8, not codified by the General Assembly, provides that: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand."

Ga. L. 2009, p. 223, § 9, not codified by the General Assembly, provides that: "Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act."

Ga. L. 2009, p. 223, § 10, not codified by the General Assembly, provides that: "A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state." Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a), not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009, and the amendment by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

17-10-35. Review of death sentences by Supreme Court; forwarding of record and transcript; scope of review; written briefs and oral argument; similar cases to be included in decision; direct appeal to be consolidated with sentence review.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

FACTORS REVIEWED BY COURT

1. PASSION, PREJUDICE, OR OTHER ARBITRARY FACTOR
2. AGGRAVATING CIRCUMSTANCES
3. EXCESSIVE OR DISPROPORTIONATE SENTENCES

General Consideration

Constitutionality.

A habeas corpus petitioner failed to assert in the original petition, the

amended petition, or the post-hearing brief a constitutional or statutory challenge to the Supreme Court of Georgia's method of proportionality review as provided in O.C.G.A. § 17-10-35(c); there-

fore, petitioner's challenge was waived. *Hall v. Lee*, 286 Ga. 79, 684 S.E.2d 868 (2009).

Evidence was sufficient to support death penalty.

Trial court did not err in sentencing the defendant to death for murder because death was not excessive or disproportionate punishment within the meaning of Georgia law and was not unconstitutional; the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, the evidence presented at the defendant's sentencing trial was clearly sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of each of the statutory aggravating circumstances found in the defendant's case, the defendant's crimes could be called "premeditated" because the defendant already knew what the defendant was going to do when the defendant took the victim away from home. *Loyd v. State*, 288 Ga. 481, 705 S.E.2d 616 (2011), cert. dismissed, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Cited in *Sharp v. State*, 286 Ga. 799, 692 S.E.2d 325 (2010).

Factors Reviewed by Court

1. Passion, Prejudice, or Other Arbitrary Factor

No reasonable probability prosecutor's remarks affected jury's discretion in determining sentence. — Prosecutor's remark that the defendant's conviction "would say enough to this dual killer," in conjunction with the state's demonstrative aid indicating that the defendant was a "mass killer," did not constitute an improper future dangerousness argument at the guilt/innocence phase of the trial because the remark was not an argument that the defendant posed a threat of future dangerousness if not found guilty but was a reasonable inference from the evidence; even assuming that the prosecutor's comment was improper, there is no reasonable probability that it affected the jury's exercise of discretion in determining the defendant death sentence. *Arrington v. State*, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, U.S. , 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

2. Aggravating Circumstances

Failure of one aggravating circumstance does not invalidate others.

The O.C.G.A. § 17-10-30(b)(10) statutory aggravating circumstance found as to each of two murder victims was not supported by the evidence based on the state's argument that killing a witness to a crime was a means of avoiding, interfering with, or preventing lawful arrest, and that once a defendant obtained the victims' ATM cards and PINs, the defendant murdered the victims because the defendant knew that the defendant would be apprehended if the victims were left alive. However, the invalidation of this statutory aggravating circumstance did not affect the death sentences imposed. *Humphreys v. State*, 287 Ga. 63, 694 S.E.2d 316, cert. denied, U.S. , 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010).

Statutory aggravating circumstances found by jury supported by evidence, etc.

Evidence adduced at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of statutory aggravating circumstances because the jury found the existence of the following statutory aggravating circumstances beyond a reasonable doubt; the murder was committed while the defendant was engaged in the commission of the capital felony of armed robbery, and the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind: (1) the defendant initially attacked the victim, who was disabled, in the confined area of a bathroom, where the defendant struck the victim multiple times shortly after the victim emerged from the shower; (2) the defendant continued the attack on the victim even as the victim fell to the floor; (3) the evidence showed that the defendant struck the victim in the head with a hammer and a metal stool at least 12 to 14 times; and (4) the defendant acted for the purpose of obtaining money the victim had just received from cashing the victim's disability check. *Arrington v. State*, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, U.S. , 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Evidence supported findings of aggravated circumstances.

Defendant was properly sentenced to death for murder and arson in the first degree because the evidence adduced at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of the statutory aggravating circumstances found in the case; the death sentences were not disproportionate punishment within the meaning of Georgia law. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

3. Excessive or Disproportionate Sentences

Death sentences upheld.

Considering the two murders committed by the defendant, the Supreme Court of Georgia determined that the sentences of death were not excessive or disproportionate to the penalty imposed in similar cases as the defendant murdered a parent and a young child for the purpose of robbing a home; the defendant made the child turn the power back on so that the defen-

dant could see the parent since the parent was still indicating signs of life and the defendant wanted to see to complete the murder; the defendant boasted of raping the child before cutting the child's throat; and, knowing that the child was still alive, the defendant set the house on fire, leaving the pair to burn. *O'Kelley v. State*, 284 Ga. 758, 670 S.E.2d 388 (2008).

Following the defendant's convictions of malice murder, aggravated sodomy, kidnapping with bodily injury, and aggravated assault after the defendant grabbed a woman who was riding a bike, dragged her to a concealed area, and sexually assaulted, beat, stomped, and killed her, the jury's imposition of a death sentence was not disproportionate punishment in light of the shocking details of the murder and in light of the defendant's long history of criminal acts against numerous women, including rape, several attempted rapes, and sexually-deviant behavior directed toward women including a 14-year-old female relative. *Ledford v. State*, 289 Ga. 70, 709 S.E.2d 239, cert. denied, U.S. , 132 S. Ct. 556, 181 L. Ed. 2d 401 (2011).

RESEARCH REFERENCES

ALR. — Claims of ineffective assistance of counsel in death penalty proceedings — United States Supreme Court cases, 31 ALR Fed. 2d 1.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense — federal cases, 42 ALR Fed. 2d 145.

17-10-35.1. Review of pretrial proceedings in cases in which death penalty is sought; reports investigating reversible error; transmittal of reports to Supreme Court; orders regarding review; Attorney General assistance; res judicata; applicability; waiver of rights.

(a) In cases in which the death penalty is sought, there may be a review of all pretrial proceedings by the Supreme Court upon a determination by the trial judge under Code Section 17-10-35.2 that such review is appropriate. The review shall be initiated by the trial judge's filing in the office of the clerk of superior court and delivering to the parties a report certifying that all pretrial proceedings in the case have been completed and that the case stands ready for trial. Within ten days after the filing of the report or the receipt of transcripts of the proceedings, whichever is later, the prosecutor and the defendant may each file with the clerk of superior court and serve upon the opposing

party a report identifying all areas of the pretrial proceedings with respect to which reversible error may arguably have occurred. Either party may consolidate with such report an application for appeal with respect to any order, decision, or judgment entered in the case. Any such application for appeal shall be in the form otherwise appropriate under subsection (b) of Code Section 5-6-34, but:

(1) Any such application for appeal shall be filed with the clerk of superior court rather than the clerk of the Supreme Court;

(2) The opposing party shall not be required or permitted to respond to such an application for appeal; and

(3) No certificate of immediate review shall be required for the filing of such application for appeal.

(b) The reports of the trial judge, prosecutor, and defendant under subsection (a) of this Code section shall be in the form of standard questionnaires prepared and supplied by the Supreme Court. Such questionnaires shall be designed to determine whether there is arguably any existence of reversible error with respect to any of the following matters:

(1) Any proceedings with respect to change of venue;

(2) Any proceedings with respect to recusal of the trial judge;

(3) Any challenge to the jury array;

(4) Any motion to suppress evidence;

(5) Any motion for psychiatric or other medical evaluation; and

(6) Any other matter deemed appropriate by the Supreme Court.

(c) Upon the filing of the reports of the parties, the clerk of superior court shall transmit to the Supreme Court the report of the trial judge, the transcripts of proceedings, and the reports of the parties together with any application for appeal consolidated therewith. A copy of all of the foregoing shall also be delivered by the clerk of superior court to the Attorney General.

(d) The Supreme Court shall issue an order granting review of the pretrial proceedings, or portions thereof, or denying review within 45 days of the date on which the case was received. The order of the Supreme Court shall identify the matters which shall be subject to review, and such matters may include, but need not be limited to, any matters called to the court's attention in any of the reports or in any application for appeal. No notice of appeal shall be required to be filed if review of the pretrial proceedings is granted. An order granting review of pretrial proceedings shall specify the period of time within which each party shall file briefs and reply briefs with respect to the

matters identified in the Supreme Court’s order granting review. The Supreme Court may order oral argument or may render a decision on the record and the briefs.

(e) If requested by the district attorney, the Attorney General shall assist in the review and appeal provided for in this Code section.

(f) Review of any matter under this Code section shall, as to any question passed on in such review, be res judicata as to such question and shall be deemed to be the law of the case.

(g) The procedure under this Code section shall not apply to any ruling or order made, invoked, or sought subsequent to the filing of the report of the trial judge.

(h) The failure of either party to assert the rights given in this Code section, or the failure of the Supreme Court to grant review, shall not waive the right to posttrial review of any question review of which could be sought under this Code section and shall not constitute an adjudication as to such question. (Code 1981, § 17-10-35.1, enacted by Ga. L. 1988, p. 1437, § 4; Ga. L. 2010, p. 420, § 1/HB 323.)

The 2010 amendment, effective July 1, 2010, substituted “45 days” for “20 days” in the first sentence of subsection (d). See the editor’s note for applicability.

Editor’s notes. — Ga. L. 2010, p. 420, § 3, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to any case docketed on or after July 1, 2010.

JUDICIAL DECISIONS

Cited in Walker v. State, 290 Ga. 696, 723 S.E.2d 894 (2012).

17-10-36. Establishment of unified review procedure by Supreme Court; effect on habeas corpus.

Law reviews. — For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in Worthy v. State, 307 Ga. App. 297, 704 S.E.2d 808 (2010).

17-10-37. Appointment of assistant to Supreme Court to review death sentences; employment of staff to compile data.

(a) There shall be an assistant to the Supreme Court who shall be an attorney appointed by the Chief Justice and who shall serve at the pleasure of the court. The assistant shall assist the Supreme Court in the review of all death sentences.

(b) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence reviewed in accordance with Code Section 17-10-35. (Code 1933, § 27-2537, enacted by Ga. L. 1973, p. 159, § 4; Ga. L. 2010, p. 420, § 2/HB 323.)

The 2010 amendment, effective July 1, 2010, in subsection (a), deleted the former last two sentences, which read: “The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information it desires with respect thereto, including, but not limited to, a synopsis or brief of the facts in the record concerning

the crime and the defendant.”, and added the present last sentence; and deleted former subsection (c), which read: “The office of the assistant shall be attached for administrative purposes to the office of the clerk of the Supreme Court of Georgia.” See the editor’s note for applicability.

Editor’s notes. — Ga. L. 2010, p. 420, § 3, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to any case docketed on or after July 1, 2010.

17-10-38. Death sentences generally.

JUDICIAL DECISIONS

Relationship to O.C.G.A. § 9-3-33. — In a 42 U.S.C. § 1983 case in which a death row inmate challenged Georgia’s three-drug lethal injection method, the complaint was untimely; the complaint was governed by the two-year statute of limitations found in O.C.G.A. § 9-3-33, and the inmate’s claim accrued in 2001

when the General Assembly adopted lethal injection as Georgia’s method of execution of death sentences as found in O.C.G.A. § 17-10-38. *Alderman v. Donald*, No. 08-12550, 2008 U.S. App. LEXIS 19072 (11th Cir. Sept. 3, 2008) (Unpublished).

ARTICLE 3

MENTALLY INCOMPETENT TO BE EXECUTED

17-10-60. “Mentally incompetent to be executed” defined.

JUDICIAL DECISIONS

Cited in *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008).

17-10-62. Exclusive procedure for challenging mental competency to be executed.

JUDICIAL DECISIONS

Habeas corpus proceeding. — O.C.G.A. § 17-10-60 et seq. is the exclusive procedure for raising a mentally incompetent to be executed challenge after sentencing, O.C.G.A. § 17-10-62, and creates a rebuttable presumption against re-litigation of a finding of competency

instead of applying the stricter habeas procedural default standard, O.C.G.A. § 17-10-69; accordingly, this issue should not arise in habeas proceedings in Georgia. Perkins v. Hall, 288 Ga. 810, 708 S.E.2d 335 (2011).

17-10-69. Prior adjudication as presumption of mental competency.

JUDICIAL DECISIONS

Habeas corpus proceeding. — O.C.G.A. § 17-10-60 et seq. is the exclusive procedure for raising a mentally incompetent to be executed challenge after sentencing, O.C.G.A. § 17-10-62, and creates a rebuttable presumption against re-litigation of a finding of competency

instead of applying the stricter habeas procedural default standard, O.C.G.A. § 17-10-69; accordingly, this issue should not arise in habeas proceedings in Georgia. Perkins v. Hall, 288 Ga. 810, 708 S.E.2d 335 (2011).

CHAPTER 12

LEGAL DEFENSE FOR INDIGENTS

Article 1

Georgia Public Defender Standards Council

- Sec.
- 17-12-3. Council created; membership.
 - 17-12-4. Authority of council; annual audit.
 - 17-12-5. Director; qualifications; selection; salary; responsibilities.
 - 17-12-6. Assistance of council to public defenders.
 - 17-12-7. Councilmembers; responsibilities; voting; removal; quorum; meetings; officers; expenses.
 - 17-12-8. Approval by council of programs for representation of indigents; public access to policies and standards.

Sec.

- 17-12-9. Continuing legal education for public defenders and staff.
- 17-12-10. Annual reporting.
- 17-12-10.1. Legislative oversight committee created; membership; reporting; audits.
- 17-12-13. Effective date of article [Repealed].

Article 2

Public Defenders

- 17-12-20. Public defender selection panel for each circuit; appointment of public defender; removal; vacancies.
- 17-12-22. Procedure for appointment of attorneys for indigent defendants in event of public de-

Sec.		Sec.	
	fender's conflict of interest; identification of conflict.	17-12-30.	Classification of personnel; responsibilities; compensation; local supplements.
17-12-23.	Cases in which public defender representation required; timing of representation; juvenile divisions; contracts with local governments.	17-12-36.	Alternate delivery system; annual review of operations by council; record keeping.
17-12-25.	Salary of public defender; private practice prohibited.	Article 4	
17-12-27.	Appointment of assistant public defenders; salary; promotions.	Verification of Indigency	
		17-12-80.	Verification of indigency required; procedure; timing of notification of eligibility.

ARTICLE 1

GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL

17-12-1. Short title; Georgia Public Defender Standards Council; responsibilities.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on legal ethics, see 59 Mercer L. Rev. 253 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Placement of Georgia Public Defenders Standards Council in executive branch. — The General Assembly was authorized to place the Georgia Public Defenders Standards Council (GPDSC) in the executive branch. A suit by GPDSC, whether by pro bono counsel or otherwise, against the state for so placing the GPDSC in the executive branch (or for any other reason) would be ultra vires and illegal. 2009 Op. Att’y Gen. No. 2009-2.

Responsibilities of Director of Georgia Public Defender Standards

Council. — Director of the Georgia Public Defender Standards Council has broad authority and is responsible for the day to day operation of the agency. The Council’s limited responsibilities, to be carried out concurrently with the director, include setting standards, conducting audits, making financial disclosures, receiving funds, providing for legal education, reporting to the General Assembly, and providing procedures for the appointment of conflict council. 2009 Op. Att’y Gen. No. 2009-5.

17-12-2. Definitions.

JUDICIAL DECISIONS

Indigency determination factoring in parents income appropriate. — While the issue of a defendant’s indigency for the purposes of obtaining court-appointed counsel could not be reviewed, it was not inappropriate to con-

sider under O.C.G.A. § 17-12-2(6)(A), along with the defendant’s income, the income of the defendant’s parents as the defendant still lived at home. *Thomas v. State*, 297 Ga. App. 416, 677 S.E.2d 433 (2009).

17-12-3. Council created; membership.

(a) There is created the Georgia Public Defender Standards Council to be composed of nine members. Other than county commission members, members of the council shall be individuals with significant experience working in the criminal justice system or who have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants.

(b) Effective July 1, 2011, the council shall be reconstituted. The members serving on the council immediately prior to July 1, 2011, shall cease to serve on that date, but such prior members shall be eligible for reappointment to succeed themselves or to fill another position on the council.

(c) The nine members of the council shall be appointed as follows:

(1) Five members shall be appointed by the Governor. The Governor shall appoint three county commissioners who have been elected and are serving as members of a county governing authority in this state. The county commissioner councilmembers appointed by the Governor shall be from different geographic regions of this state. The Governor may solicit recommendations for such appointees from the Association County Commissioners of Georgia. Each county commissioner councilmember shall serve a term of four years; provided, however, that the initial appointments shall be for one, two, and three years, respectively, as designated by the Governor for each appointment, and thereafter, such members shall serve terms of four years. A county commission councilmember shall be eligible to serve so long as he or she retains the office by virtue of which he or she is serving on the council. The Governor shall appoint two other members to the council, one of whom shall be a circuit public defender, who shall serve terms of four years;

(2) Two members shall be appointed by the Lieutenant Governor and each shall serve terms of four years; provided, however, that the initial appointments shall be for one and four years, respectively, as designated by the Lieutenant Governor for each appointment, and thereafter, such members shall serve terms of four years; and

(3) Two members shall be appointed by the Speaker of the House of Representatives and each shall serve terms of four years; provided, however, that the initial appointments shall be for two and three years, respectively, as designated by the Speaker of the House of Representatives for each appointment, and thereafter, such members shall serve terms of four years.

(d) All initial terms shall begin on July 1, 2011, and their successors' terms shall begin on July 1 following their appointment. Any vacancy

for a member shall be filled by the appointing authority, and such appointee shall serve the balance of the vacating member's unexpired term. Any member of the council may be appointed to successive terms.

(e) In making the appointments of members of the council who are not county commissioners, the appointing authorities shall seek to identify and appoint persons who represent a diversity of backgrounds and experience and shall solicit suggestions from the State Bar of Georgia, local bar associations, the Georgia Association of Criminal Defense Lawyers, the councils representing the various categories of state court judges in Georgia, and the Prosecuting Attorneys' Council of the State of Georgia, as well as from the public and other interested organizations and individuals within this state. The appointing authorities may solicit recommendations for county commissioners from the Association County Commissioners of Georgia. The appointing authorities shall not appoint a prosecuting attorney as defined in paragraph (6) of Code Section 19-13-51, any employee of a prosecuting attorney's office, or an employee of the Prosecuting Attorneys' Council of the State of Georgia to serve on the council. (Code 1981, § 17-12-3, enacted by Ga. L. 2011, p. 91, § 1/HB 238.)

Effective date. — This Code section became effective July 1, 2011.

Editor's notes. — Ga. L. 2011, p. 91, § 1, repealed former Code Section 17-12-3, pertaining to the creation and membership of the Georgia Public Defender Standards Council, and enacted

the present Code section, effective July 1, 2011. The former Code section was based on Code 1981, § 17-12-8, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2005, p. ES3, § 11; Ga. L. 2006, p. 752, § 5/SB 503; Ga. L. 2008, p. 846, § 16/HB 1245.

17-12-4. Authority of council; annual audit.

(a) The council:

- (1) Shall be a legal entity;
- (2) Shall have perpetual existence;
- (3) May contract;
- (4) May own property;

(5) May accept funds, grants, and gifts from any public or private source, which shall be used to defray the expenses incident to implementing its purposes;

(6) May adopt and use an official seal; and

(7) May establish a principal office.

(b) The council shall establish auditing procedures as may be required in connection with the handling of public funds. The state auditor shall be authorized and directed to make an annual audit of the

transactions of the council and to make a complete report of the same to the General Assembly. The annual audit shall disclose all moneys received by the council and all expenditures made by the council by revenue source, including all programs and special projects itemized in the General Appropriations Act. The annual audit shall include an itemization by revenue source of encumbered and reserved money. Revenue sources shall include each county governing authority's expenditures which are made pursuant to Code Sections 17-12-31 and 17-12-32 and city or county expenditures which are made pursuant to subsection (d) of Code Section 17-12-23. The state auditor shall also make an audit of the affairs of the council at any time when requested to do so by a majority of the council or by the Governor or General Assembly.

(c) The council may not provide compensation from its funds to any administrative or clerical personnel employed by the council if the personnel are then receiving retirement compensation from any retirement or pension fund created by Title 47 to provide compensation for past services as a judicial officer, prosecuting attorney, indigent defense attorney, court officer, or law enforcement officer except for county or municipal retirement funds. (Code 1981, § 17-12-4, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 17/HB 1245; Ga. L. 2011, p. 91, § 2/HB 238.)

The 2011 amendment, effective July 1, 2011, added "and" to the end of paragraph (a)(6); substituted a period for a semicolon at the end of paragraph (a)(7); deleted former paragraph (a)(8), which read: "May hire such administrative and clerical personnel as may be necessary

and appropriate to fulfill its purposes; and"; and deleted former paragraph (a)(9), which read: "Shall have such other powers, privileges, and duties as may be reasonable and necessary for the proper fulfillment of its purposes."

17-12-5. Director; qualifications; selection; salary; responsibilities.

(a) To be eligible for appointment as the director, a candidate shall be a member in good standing of the State Bar of Georgia with at least seven years' experience in the practice of law. The director shall be selected on the basis of training and experience and such other qualifications as the council deems appropriate. The director shall be appointed by the Governor and shall serve at the pleasure of the Governor.

(b)(1) The director shall work with and provide support services and programs for circuit public defender offices and other attorneys representing indigent persons in criminal or juvenile cases in order to improve the quality and effectiveness of legal representation of such persons and otherwise fulfill the purposes of this chapter. Such services and programs shall include, but shall not be limited to,

technical, research, and administrative assistance; educational and training programs for attorneys, investigators, and other staff; assistance with the representation of indigent defendants with mental disabilities; assistance with the representation of juveniles; assistance with death penalty cases; and assistance with appellate advocacy.

(2) The director may establish divisions within the office to administer the services and programs as may be necessary to fulfill the purposes of this chapter. The director shall establish a mental health advocacy division and the Georgia capital defender division.

(3) The director may hire and supervise such staff employees and may contract with outside consultants on behalf of the office as may be necessary to provide the services contemplated by this chapter.

(c) The director shall have and may exercise the following power and authority:

(1) The power and authority to take or cause to be taken any or all action necessary to perform any indigent defense services or otherwise necessary to perform any duties, responsibilities, or functions which the director is authorized by law to perform and to exercise any power or authority which the council is authorized under subsection (a) of Code Section 17-12-4 to exercise;

(2) The power and authority to enforce or otherwise require compliance with any and all rules, regulations, procedures, or directives necessary to perform any indigent defense services; to carry into effect the minimum standards and policies promulgated by the council; and to perform any duties, responsibilities, or functions which the council is authorized under subsection (a) of Code Section 17-12-4 to perform or to exercise; and

(3) The power and authority to assist the council in the performance of its duties, responsibilities, and functions and the exercise of its power and authority.

(d) The director shall:

(1) Prepare and submit to the council a proposed budget for the council. The director shall also prepare and submit an annual report containing pertinent data on the operations, costs, and needs of the council and such other information as the council may require;

(2) Develop such rules, procedures, and regulations as the director determines may be necessary to carry out the provisions of this chapter and submit these to the council for approval and comply with all applicable laws, standards, and regulations;

(3) Administer and coordinate the operations of the council and supervise compliance with policies and standards adopted by the council;

(4) Maintain proper records of all financial transactions related to the operation of the council;

(5) At the director's discretion, solicit and accept on behalf of the council any funds that may become available from any source, including government, nonprofit, or private grants, gifts, or bequests;

(6) Coordinate the services of the council with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this chapter and consult with professional bodies concerning the implementation and improvement of programs for providing indigent services;

(7) Provide for the training of attorneys and other staff involved in the legal representation of persons subject to this chapter;

(8) Attend all council meetings, except those meetings or portions thereof that address the question of appointment or removal of the director;

(9) Ensure that the expenditures of the council are not greater than the amounts budgeted or available from other revenue sources;

(10) Hire a mental health advocate who shall serve as director of the division of the office of mental health advocacy;

(11) Hire the capital defender who shall serve as the director of the division of the office of the Georgia capital defender; and

(12) Evaluate each circuit public defender's job performance. (Code 1981, § 17-12-5, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2008, p. 846, § 18/HB 1245; Ga. L. 2011, p. 91, § 3/HB 238.)

The 2011 amendment, effective July 1, 2011, in paragraph (c)(1), substituted "director" for "council", substituted "and" for "or" and substituted "under subsection (a) of Code Section 17-12-4" for "by law"; rewrote paragraph (c)(2); in paragraph (d)(2), substituted "procedures, and regulations as the director determines" for "policies, procedures, regulations, and standards as", inserted "and submit these to the council for approval", and deleted "and submit these to the council for approval" following "regulations" at the end;

in the middle of paragraph (d)(3), substituted "policies" for "rules, policies, procedures, regulations,"; in paragraph (d)(10) and (d)(11), deleted "with the pending approval of the council," following "Hire"; added "and" to the end of paragraph (d)(11); in paragraph (d)(12), deleted "and communicate his or her findings to the council, and" following "performance" at the end; and deleted former paragraph (d)(13), which read: "Perform other duties as the council may assign."

OPINIONS OF THE ATTORNEY GENERAL

Responsibilities of Director of Georgia Public Defender Standards Council. — Director of the Georgia Public Defender Standards Council has broad authority and is responsible for the day to day operation of the agency. The Council’s limited responsibilities, to be carried out concurrently with the director, include

setting standards, conducting audits, making financial disclosures, receiving funds, providing for legal education, reporting to the General Assembly, and providing procedures for the appointment of conflict council. 2009 Op. Att’y Gen. No. 2009-5.

17-12-6. Assistance of council to public defenders.

(a) The council shall assist the public defenders throughout the state in their efforts to provide adequate legal defense to the indigent. Assistance may include:

- (1) The preparation and distribution of a basic defense manual and other educational materials;
- (2) The preparation and distribution of model forms and documents employed in indigent defense;
- (3) The promotion of and assistance in the training of indigent defense attorneys;
- (4) The provision of legal research assistance to public defenders; and
- (5) The provision of such other assistance to public defenders as may be authorized by law.

(b) The council:

- (1) Shall be the fiscal officer for the circuit public defender offices and shall account for all moneys received from each governing authority; and
- (2) Shall collect, maintain, review, and publish in print or electronically records and statistics for the purpose of evaluating the delivery of indigent defense representation in Georgia. (Code 1981, § 17-12-6, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 19/HB 1245; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 3, 2010, inserted “in print or electronically” in paragraph (b)(2).

17-12-7. Councilmembers; responsibilities; voting; removal; quorum; meetings; officers; expenses.

(a) All members of the council shall at all times act in the best interest of indigent defendants who are receiving legal representation under the provisions of this chapter.

(b) All members of the council shall be entitled to vote on any matter coming before the council unless otherwise provided by law or by rules adopted by the council concerning conflicts of interest.

(c) Each member of the council shall serve until a successor has been appointed. Removal of council members shall be for cause and shall be in accordance with policies and procedures adopted by the council.

(d) Unless otherwise provided in this article, a quorum shall be a majority of the members of the council who are then in office, and decisions of the council shall be by majority vote of the members present, except that a majority of the entire council shall be required to approve the appointment of the chairperson and for annual approval of an alternative delivery system pursuant to Code Section 17-12-36 and other matters as set forth in Code Section 17-12-36. The vote of two-thirds of the members of the entire council shall be required to remove the chairperson of the council or to overturn the director's decision regarding the removal of a circuit public defender.

(e) The council shall meet at least quarterly and at such other times and places as it deems necessary or convenient for the performance of its duties.

(f) The council shall elect a chairperson and such officers from the members of the council as it deems necessary and shall adopt such rules for the transaction of its business as it desires. The chairperson and officers shall serve for a term of two years and may be removed without cause by a vote of two-thirds of the members of the entire council and for cause by a majority vote of the entire council. The chairperson shall retain a vote on all matters except those in which the chairperson has a conflict of interest or the removal of the chairperson for cause. The council shall keep and maintain minutes of all council meetings.

(g) The members of the council shall receive no compensation for their services but shall be reimbursed for their actual expenses incurred in the performance of their duties as members of the council. Any expenses incurred by the council shall be paid from the general operating budget of the council. (Code 1981, § 17-12-7, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2011, p. 91, § 4/HB 238.)

The 2011 amendment, effective July 1, 2011, in subsection (d), substituted "shall be required to approve the appointment of the chairperson and for annual

approval of” for “must approve the appointment or removal of the chairperson or removal of a circuit public defender for

cause pursuant to Code Section 17-12-20 and” and added the second sentence.

17-12-8. Approval by council of programs for representation of indigents; public access to policies and standards.

(a) The council shall approve the development and improvement of programs which provide legal representation to indigent persons and juveniles.

(b) The council shall approve and implement programs, services, policies, and standards as may be necessary to fulfill the purposes and provisions of this chapter and to comply with all applicable laws governing the rights of indigent persons accused of violations of criminal law.

(c) All policies and standards that are promulgated by the council shall be publicly available for review and shall be posted on the council’s website. Each policy and standard shall identify the date upon which such policy and standard took effect. (Code 1981, § 17-12-3, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2005, p. ES3, § 12; Ga. L. 2005, p. 60, § 17/HB 95; Ga. L. 2005, p. 910, § 1/HB 366; Ga. L. 2006, p. 752, § 6/SB 503; Ga. L. 2008, p. 846, § 20/HB 1245; Ga. L. 2011, p. 91, § 5/HB 238.)

The 2011 amendment, effective July 1, 2011, substituted “policies,” for “rules, policies, procedures, regulations,” near the beginning of subsection (b); and, in subsection (c), deleted “rules, regula-

tions,” following “All” at the beginning of the first sentence, deleted “rule, regulation,” preceding “policy” twice in the second sentence, and made minor punctuation changes throughout.

17-12-9. Continuing legal education for public defenders and staff.

The council shall be authorized to conduct or approve for credit or reimbursement, or both, basic and continuing legal education courses or other appropriate training programs for the circuit public defenders or their staff members. The council, in accordance with such policies as it shall adopt, shall be authorized to provide reimbursement, in whole or in part, for the actual expenses incurred by any circuit public defender or their staff members in attending any approved course or training program from funds as may be appropriated or otherwise made available to the council. The circuit public defenders or their staff members shall be authorized to receive reimbursement for actual expenses incurred in attending approved courses or training programs. The council shall adopt policies governing the approval of courses and training programs for credit or reimbursement as may be necessary to administer this Code section properly. (Code 1981, § 17-12-9, enacted

by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 21/HB 1245; Ga. L. 2011, p. 91, § 6/HB 238.)

The 2011 amendment, effective July 1, 2011, substituted “policies” for “rules” in the second and fourth sentences of this Code section.

17-12-10. Annual reporting.

(a) The council shall prepare annually a report of its activities in order to provide the General Assembly, the Governor, and the Supreme Court of Georgia with an accurate description and accounting of the preceding year’s expenditures and revenue, including moneys received from cities and county governing authorities. Such report shall include a three-year cost projection and anticipated revenues for all programs defined in the General Appropriations Act.

(b) The council shall provide to the General Assembly, the Governor, and the Supreme Court of Georgia a detailed analysis of all grants and funds, whether public or private, applied for or granted, together with how and in what manner the same are to be utilized and expended.

(c) The director shall prepare annually a report in order to provide the General Assembly, the Supreme Court, and the Governor with information on the council’s assessment of the delivery of indigent defense services, including, but not limited to, the costs involved in operating each program and each governing authority’s indigent person verification system, methodology used, costs expended, and savings realized. (Code 1981, § 17-12-10, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 22/HB 1245; Ga. L. 2011, p. 91, § 7/HB 238.)

The 2011 amendment, effective July 1, 2011, near the beginning of subsection (c), substituted “director” for “council” and inserted “, the Supreme Court,”.

17-12-10.1. Legislative oversight committee created; membership; reporting; audits.

(a) There is created the Legislative Oversight Committee for the Georgia Public Defender Standards Council which shall be composed of eight persons: three members of the House of Representatives appointed by the Speaker of the House of Representatives, three members of the Senate appointed by the Senate Committee on Assignments or such person or entity as established by Senate rule, and one member of the House of Representatives and one member of the Senate appointed by the Governor. The members of such committee shall be selected within ten days after the convening of the General Assembly in each odd-numbered year and shall serve until their successors are appointed.

(b) The Speaker of the House of Representatives shall appoint a member of such committee to serve as chairperson, and the Senate Committee on Assignments or such person or entity as established by Senate rule shall appoint one member of the committee to serve as vice chairperson during each even-numbered year. The Senate Committee on Assignments or such person or entity as established by Senate rule shall appoint a member of such committee to serve as chairperson, and the Speaker of the House of Representatives shall appoint one member to serve as vice chairperson during each odd-numbered year. Such committee shall meet at least three times each year and, upon the call of the chairperson, at such additional times as deemed necessary by the chairperson.

(c) It shall be the duty of such committee to review and evaluate:

- (1) Information on new programs submitted by the council;
- (2) Information on rules, regulations, policies, and standards proposed by the council;
- (3) The strategic plans for the council;
- (4) Program evaluation reports and budget recommendations of the council;
- (5) The fiscal impact of fees and fines on counties;
- (6) The reports submitted pursuant to Code Section 15-21A-7 in order to identify, among other things, opportunities to reduce or consolidate fees, fines, and surcharges; and
- (7) Such other information or reports as deemed necessary by such committee.

(d) The council and director shall cooperate with such committee and provide such information or reports as requested by the committee for the performance of its functions.

(e) The council shall submit its budget estimate to the director of the Office of Planning and Budget in accordance with subsection (a) of Code Section 45-12-78.

(f) The legislative oversight committee shall make an annual report of its activities and findings to the membership of the General Assembly, the Chief Justice of the Supreme Court, and the Governor within one week of the convening of each regular session of the General Assembly. The chairperson of such committee shall deliver written executive summaries of such report to the members of the General Assembly prior to the adoption of the General Appropriations Act each year.

(g) The members of such committee shall receive the allowances authorized for legislative members of legislative committees. The funds

necessary to pay such allowances shall come from funds appropriated to the House of Representatives and the Senate.

(h) The legislative oversight committee shall be authorized to request that a performance audit of the council be conducted. (Code 1981, § 17-12-10.1, enacted by Ga. L. 2005, p. ES3, § 13; Ga. L. 2007, p. 65, § 2/SB 139; Ga. L. 2008, p. 846, § 23/HB 1245; Ga. L. 2011, p. 91, § 8/HB 238.)

The 2011 amendment, effective July 1, 2011, inserted “, the Chief Justice of the Supreme Court,” in the first sentence of subsection (f).

17-12-12. Georgia capital defender division; duties, responsibilities, and management.

JUDICIAL DECISIONS

Appointment of counsel. — Trial court acted within the court’s discretion in replacing the defendant’s appointed private attorneys with salaried counsel from the capital defender’s division of the Georgia Public Defender Standards Council (GPDSC) because retaining the defen-

dant’s current counsel would perpetuate the funding problems that had plagued the case; evidence was presented that the GPDSC, and possibly the county, currently had funds available for travel and other investigative expenses. *Phan v. State*, 290 Ga. 588, 723 S.E.2d 876 (2012).

17-12-12.1. Payment of attorney in event of conflict of interest in capital cases; number of attorneys appointed; county governing authority’s financial responsibility; expenses.

JUDICIAL DECISIONS

Constitutionality. — Because appointment of counsel to represent a defendant in a death penalty case occurred before its effective date, the application of former O.C.G.A. § 17-12-127(b) regarding payment of costs and attorney’s fees by the Georgia Public Defender Standards Council did not violate the prohibition on the State’s assumption of prior debts as set forth in Ga. Const. 1983, Art. VII, Sec. IV, Para. X. *Ga. Pub. Defender Stds. Council v. State*, 285 Ga. 169, 675 S.E.2d 25 (2009).

County was responsible to pay fees

and costs. — The Georgia Public Defender Standards Council was required to pay attorney’s fees and expenses in a death penalty case to appointed counsel pursuant to former O.C.G.A. § 17-12-127(b) because nothing in former O.C.G.A. § 17-12-124 required that the Council fund representation only for defendants who were indicted or sent a death penalty notice after a certain date and counsel were appointed after the effective date of former § 17-12-127(b). *Ga. Pub. Defender Stds. Council v. State*, 285 Ga. 169, 675 S.E.2d 25 (2009).

17-12-13. Effective date of article.

Repealed by Ga. L. 2011, p. 91, § 9/HB 238, effective July 1, 2011.

Editor's notes. — This Code section was based on Code 1981, § 17-12-13, enacted by Ga. L. 2003, p. 191, § 1.

ARTICLE 2

PUBLIC DEFENDERS

17-12-20. Public defender selection panel for each circuit; appointment of public defender; removal; vacancies.

(a) On and after July 1, 2011, there is created in each judicial circuit in this state a circuit public defender supervisory panel to be composed of three members, all of whom shall be attorneys who regularly practice in that particular judicial circuit. The chief judge of the superior court of the circuit shall appoint one member. The Governor shall appoint one member. In a single county judicial circuit, the chairperson of the governing authority or sole commissioner shall appoint one member; in multicounty judicial circuits, the chairpersons of the governing authorities or sole commissioners shall caucus and appoint one member. When a caucus is needed to appoint a member of the supervisory panel, the chairperson or sole commissioner of the largest county by population in the judicial circuit shall convene the caucus. Members of the circuit public defender supervisory panel shall be individuals with significant experience working in the criminal justice system or who have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants. A prosecuting attorney as defined in paragraph (6) of Code Section 19-13-51, any employee of a prosecuting attorney's office, or an employee of the Prosecuting Attorneys' Council of the State of Georgia shall not serve as a member of the circuit public defender supervisory panel after July 1, 2005. On and after July 1, 2008, no employees of the council shall serve as a member of the circuit public defender supervisory panel. Members of the circuit public defender supervisory panel shall reside in the judicial circuit in which they serve. The circuit public defender supervisory panel members shall serve for a term of five years. Any vacancy for an appointed member shall be filled by the appointing authority within 60 days of the vacancy occurring.

(b)(1) By majority vote of its membership, the circuit public defender supervisory panel shall annually elect a chairperson and secretary. The chairperson shall conduct the meetings and deliberations of the panel and direct all activities. The secretary shall keep accurate records of all the meetings and deliberations and perform such other duties as the chairperson may direct. The panel may be called into session upon the direction of the chairperson or by the council.

(2) By majority vote of its membership, the circuit public defender supervisory panel shall nominate not more than five people to serve

as the circuit public defender in the circuit. The director shall select the circuit public defender from the panel's list of nominees. A circuit public defender shall serve a term for up to four years and may be appointed for successive terms but shall not be reappointed if he or she was removed pursuant to subsection (c) of this Code section.

(c) A circuit public defender may be removed for cause by the director. If a circuit public defender wants to appeal such removal, he or she may appeal the decision to the council. By a vote of two-thirds of the members of the entire council, the council may overturn the director's decision. Any appeal regarding a removal request shall be submitted to the council within 15 days of the effective date of the removal, and the council shall take action in hearing the appeal at its next regularly scheduled meeting and take final action within 30 days thereafter. A circuit public defender who has been removed by the director who has filed an appeal with the council shall continue to serve as the circuit public defender until the council reaches a decision on the appeal.

(d) A circuit public defender supervisory panel may convene at any time during its circuit public defender's term of office and shall convene at least annually for purposes of reviewing the circuit public defender's job performance and the performance of the circuit public defender office. The director and circuit public defender shall be notified at least two weeks in advance of the convening of the circuit public defender supervisory panel. The circuit public defender shall be given the opportunity to appear before the circuit public defender supervisory panel and present evidence and testimony. The chairperson shall determine the agenda for the annual review process, but, at a minimum, such review shall include information collected pursuant to subsection (c) of Code Section 17-12-24, usage of state and local funding, expenditures, and budgeting matters. The chairperson shall make an annual report on or before the thirtieth day of September of each year concerning the circuit public defender supervisory panel's findings regarding the job performance of the circuit public defender and his or her office to the director on a form provided to the panel by the director. If at any time the circuit public defender supervisory panel finds that the circuit public defender is performing in a less than satisfactory manner or finds information of specific misconduct, the circuit public defender supervisory panel may by majority vote of its members adopt a resolution seeking review of their findings and remonstrative action by the director. Such resolution shall specify the reason for such request. All evidence presented and the findings of the circuit public defender supervisory panel shall be forwarded to the director within 15 days of the adoption of the resolution. The director shall initiate action on the circuit public defender supervisory panel's resolution within 30 days of receiving the resolution. The director shall notify the circuit public defender supervisory panel, in writing, of any actions taken pursuant to submission of a resolution under this subsection.

(e) If a vacancy occurs for the position of circuit public defender, the director shall appoint an interim circuit public defender to serve until the director has appointed a replacement. Within 30 days of the vacancy occurring, the circuit public defender supervisory panel shall meet and nominate not more than five people to serve as a replacement circuit public defender. The director shall select the replacement circuit public defender from the panel's list of nominees. (Code 1981, § 17-12-20, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2005, p. ES3, § 17; Ga. L. 2008, p. 846, § 28/HB 1245; Ga. L. 2011, p. 91, § 10/HB 238.)

The 2011 amendment, effective July 1, 2011, rewrote this Code section.

17-12-22. Procedure for appointment of attorneys for indigent defendants in event of public defender's conflict of interest; identification of conflict.

(a) The director, with input from the council, shall establish a procedure for providing legal representation in cases where the circuit public defender office has a conflict of interest. Such procedure may include, but shall not be limited to, the appointment of individual counsel on a case-by-case basis or the utilization of another circuit public defender office. Whatever procedure the director establishes for each circuit's conflict of interest cases shall be adhered to by the circuit public defender office. It is the intent of the General Assembly that the director consider the most efficient and effective system to provide legal representation where the circuit public defender office has a conflict of interest.

(b) The circuit public defender shall establish a method for identifying conflicts of interest at the earliest possible opportunity. If there is a conflict of interest such that the circuit public defender office cannot represent a defendant and an attorney who is not employed by the circuit public defender office is appointed, such attorney shall have a contractual relationship with the council to represent indigent persons in conflict of interest cases, and such relationship may include, but shall not be limited to, a flat fee structure.

(c) Attorneys who seek appointment in conflict cases shall have such experience or training in the defense of criminal cases as is necessary in light of the complexity of the case to which he or she is appointed and shall meet such qualifications and standards for the representation of indigent defendants as are established by the council. (Code 1981, § 17-12-22, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 29/HB 1245; Ga. L. 2010, p. 226, § 2A/HB 889; Ga. L. 2011, p. 91, § 11/HB 238.)

The 2010 amendment, effective July 1, 2010, in subsection (a), deleted “when feasible” following “office” at the end of the second sentence and added the third sentence.

The 2011 amendment, effective July 1, 2011, in subsection (a), in the beginning of the first sentence, inserted “director, with input from the” and inserted a

comma, and substituted “director” for “council” in the third and fourth sentences; and deleted “, regulations,” following “qualifications” near the end of subsection (c).

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

17-12-23. Cases in which public defender representation required; timing of representation; juvenile divisions; contracts with local governments.

(a) The circuit public defender shall provide representation in the following actions and proceedings:

(1) Any case prosecuted in a superior court under the laws of the State of Georgia in which there is a possibility that a sentence of imprisonment or probation or a suspended sentence of imprisonment may be adjudged;

(2) A hearing on a revocation of probation in a superior court;

(3) Any juvenile court case where the juvenile may face a disposition of confinement, commitment, or probation; and

(4) Any direct appeal of any of the proceedings enumerated in paragraphs (1) through (3) of this subsection.

(b) In each of the actions and proceedings enumerated in subsection (a) of this Code section, entitlement to the services of counsel begins not more than three business days after the indigent person is taken into custody or service is made upon him or her of the charge, petition, notice, or other initiating process and such person makes an application for counsel to be appointed.

(c) Each circuit public defender shall establish a juvenile division within the circuit public defender office to specialize in the defense of juveniles.

(d) A city or county may contract with the circuit public defender office for the provision of criminal defense for indigent persons accused of violating city or county ordinances or state laws. If a city or county does not contract with the circuit public defender office, the city or county shall be subject to all applicable policies and standards adopted by the council for representation of indigent persons in this state. (Code 1981, § 17-12-23, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2006, p. 710, § 5/SB 203; Ga. L. 2008, p. 846, § 30/HB 1245; Ga. L. 2011, p. 91, § 12/HB 238.)

The 2011 amendment, effective July 1, 2011, substituted “policies and” for “rules, regulations, policies, and” in the last sentence of subsection (d).

JUDICIAL DECISIONS

Right to appointed counsel on direct appeal. — Convicted defendant had the right to appointed counsel on direct appeal; therefore, a trial court was required to determine that the defendant knowingly and voluntarily waived the defendant’s right to counsel prior to allowing the defendant’s appointed counsel to with-

draw. A remand was required for consideration of whether the waiver was knowing and voluntary. *Calmes v. State*, 312 Ga. App. 769, 719 S.E.2d 516 (2011), cert. denied, No. S12C0538, 2012 Ga. LEXIS 324 (Ga. 2012).

Cited in *Potter v. State*, 283 Ga. 576, 662 S.E.2d 128 (2008).

17-12-25. Salary of public defender; private practice prohibited.

(a) Each circuit public defender shall receive an annual salary of \$87,593.58, and cost-of-living adjustments may be given by the General Assembly in the General Appropriations Act by a percentage not to exceed the average percentage of the general increase in salary as may from time to time be granted to employees of the executive, judicial, and legislative branches of government; provided, however, that any increase for such circuit public defender shall not include within-grade step increases for which classified employees as defined by Code Section 45-20-2 are eligible. Any increase granted pursuant to this subsection shall become effective at the same time that funds are made available for the increase for such employees. The Office of Planning and Budget shall calculate the average percentage increase.

(b) The county or counties comprising the judicial circuit may supplement the salary of the circuit public defender in an amount as is or may be authorized by local Act or in an amount as may be determined by the governing authority of the county or counties, whichever is greater.

(c) No circuit public defender shall engage in the private practice of law for profit or serve concurrently in any judicial office. (Code 1981, § 17-12-25, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2005, p. ES3, § 18; Ga. L. 2008, p. 846, § 32/HB 1245; Ga. L. 2009, p. 745, § 1/SB 97; Ga. L. 2012, p. 446, § 2-18/HB 642.)

The 2009 amendment, effective July 1, 2009, substituted “State Personnel Administration” for “state merit system” near the end of the first sentence of subsection (a).

The 2012 amendment, effective July 1, 2012, substituted “as defined by Code Section 45-20-2” for “of the State Personnel Administration” in the first sentence of subsection (a).

Editor’s notes. — Ga. L. 2012, p. 446, § 3-1/HB 642, not codified by the General Assembly, provides that: “Personnel, equipment, and facilities that were assigned to the State Personnel Administration as of June 30, 2012, shall be transferred to the Department of Administrative Services on the effective date of this Act.” This Act became effective July 1, 2012.

Ga. L. 2012, p. 446, § 3-2/HB 642, not codified by the General Assembly, provides that: "Appropriations for functions which are transferred by this Act may be transferred as provided in Code Section 45-12-90."

17-12-27. Appointment of assistant public defenders; salary; promotions.

(a) Subject to the provisions of this Code section, the circuit public defender in each judicial circuit is authorized to appoint:

(1) One assistant public defender for each superior court judge authorized for the circuit, excluding the chief judge and senior judges; and

(2) Subject to funds being appropriated by the General Assembly or otherwise available, additional assistant public defenders as may be authorized by the council. In authorizing additional assistant public defenders, the council shall consider the caseload, present staff, and resources available to each circuit public defender and shall make authorizations as will contribute to the efficiency of individual circuit public defenders and the effectiveness of providing adequate legal defense for indigent defendants.

(b) Each assistant public defender appointed pursuant to subsection (a) of this Code section shall be classified based on education, training, and experience. The jobs of assistant public defenders and the minimum qualifications required for appointment or promotion to each job shall be established by the council based on education, training, and experience and in accordance with the provisions of Code Sections 17-12-30 and 17-12-34.

(c) Each assistant public defender appointed pursuant to this Code section shall be compensated based on a salary range established in accordance with subsection (c) of Code Section 17-12-30. The salary range for each job established in accordance with subsection (b) of this Code section shall be as follows:

(1) Assistant public defender I. Not less than \$38,124.00 nor more than 65 percent of the compensation of the circuit public defender;

(2) Assistant public defender II. Not less than \$40,884.00 nor more than 70 percent of the compensation of the circuit public defender;

(3) Assistant public defender III. Not less than \$45,108.00 nor more than 80 percent of the compensation of the circuit public defender; and

(4) Assistant public defender IV. Not less than \$52,176.00 nor more than 90 percent of the compensation of the circuit public defender.

(d) All personnel actions involving attorneys appointed pursuant to this Code section shall be made by the circuit public defender in writing in accordance with the provisions of Code Section 17-12-30.

(e)(1) All salary advancements shall be based on quality of work, education, and performance.

(2) The salary of an assistant public defender appointed pursuant to this Code section may be increased at the first of the calendar month following the anniversary of his or her appointment.

(3) The salary of any assistant public defender who, subsequent to his or her appointment pursuant to this Code section, is awarded an LL.M. or S.J.D. degree by a law school recognized by the State Bar of Georgia from which a graduate of or student enrolled therein is permitted to take the bar examination or by a law school accredited by the American Bar Association or the Association of American Law Schools may be increased effective on the first day of the calendar month following the award of the degree, provided that such advancement does not exceed the maximum of the salary range applicable to the attorney's job classification.

(f) Any assistant public defender appointed pursuant to this Code section may be promoted to the next highest job at any time the attorney meets the minimum qualifications for such job, but in order to be eligible for promotion, the attorney shall have served not less than 12 months in the job from which the attorney is to be promoted. When an assistant public defender is promoted to the next highest job, the assistant public defender shall enter the higher job at an annual salary greater than the annual salary the assistant public defender was receiving immediately prior to the promotion.

(g) All full-time state paid employees of the office of the circuit public defender shall be state employees in the unclassified service as defined by Chapter 20 of Title 45 with all benefits of such appointed state employees as provided by law. A circuit public defender, assistant public defender, or local public defender may be issued an employee identification card by his or her employing agency; provided, however, that no employer of any such public defender shall issue nor shall any public defender display, wear, or carry any badge, shield, card, or other item that is similar to a law enforcement officer's badge or that could be reasonably construed to indicate that the public defender is a peace officer or law enforcement official.

(h) Notwithstanding the provisions of subsection (g) of this Code section, an employee of a local public defender office who was an employee of the office on June 30, 2004, and who becomes a circuit public defender or an employee of a circuit public defender office before July 1, 2005, may elect, with the consent of the former employer and the

consent of the council, to remain an employee of the entity for which the employee worked as a local public defender; and such entity shall be his or her employer for all purposes, including, without limitation, compensation and employee benefits. The right to make an election pursuant to this subsection shall expire on July 1, 2005. The council shall reimburse the appropriate entity for compensation, benefits, and employer contributions under the federal Social Security Act, but the total payment from the council to the entity on behalf of the employee shall not exceed the amount otherwise payable to or for the employee under the circumstance where the employee had become a state employee. (Code 1981, § 17-12-28, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2005, p. ES3, § 20; Ga. L. 2005, p. 60, § 17/HB 95; Ga. L. 2006, p. 752, § 9/SB 503; Ga. L. 2009, p. 745, § 2/SB 97; Ga. L. 2012, p. 446, § 2-19/HB 642.)

The 2009 amendment, effective July 1, 2009, substituted “State Personnel Administration” for “State Merit System of Personnel Administration” in the middle of the first sentence of subsection (g).

The 2012 amendment, effective July 1, 2012, in subsection (g), substituted “as defined by Chapter 20 of Title 45” for “of the State Personnel Administration” in the first sentence and inserted the first occurrence of “that” in the second sentence.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, “Chapter 20” was substituted for “Chapter” in the first sentence of subsection (g).

Editor’s notes. — Ga. L. 2012, p. 446, § 3-1/HB 642, not codified by the General Assembly, provides that: “Personnel, equipment, and facilities that were assigned to the State Personnel Administration as of June 30, 2012, shall be transferred to the Department of Administrative Services on the effective date of this Act.” This Act became effective July 1, 2012.

Ga. L. 2012, p. 446, § 3-2/HB 642, not codified by the General Assembly, provides that: “Appropriations for functions which are transferred by this Act may be transferred as provided in Code Section 45-12-90.”

17-12-30. Classification of personnel; responsibilities; compensation; local supplements.

(a) All state paid personnel employed by the circuit public defenders pursuant to this article shall be employees of the executive branch of state government and shall be in the unclassified service as defined by Code Section 45-20-2.

(b) Personnel employed by the circuit public defenders pursuant to this article shall have the authority, duties, powers, and responsibilities as are authorized by law or as assigned by the circuit public defender and shall serve at the pleasure of the circuit public defender.

(c)(1) The council shall establish salary ranges for each state paid position authorized by this article or any other provision of law. Salary ranges shall be similar to the state-wide and senior executive ranges adopted pursuant to the rules of the State Personnel Board and shall provide for minimum, midpoint, and maximum salaries not

to exceed the maximum allowable salary. In establishing the salary ranges, all amounts will be rounded off to the nearest whole dollar. The council may, from time to time, revise the salary ranges to include across-the-board increases which the General Assembly may from time to time authorize in the General Appropriations Act.

(2) The circuit public defender shall fix the compensation of each state paid employee appointed pursuant to this article in accordance with the job to which the person is appointed and the appropriate salary range.

(3) All salary advancements shall be based on quality of work, training, and performance. The salary of state paid personnel appointed pursuant to this article may be increased at the first of the calendar month following the annual anniversary of the person's appointment. No employee's salary shall be advanced beyond the maximum established in the applicable pay range.

(4) Any reduction in salary shall be made in accordance with the salary range for the position and the policies adopted by the council.

(5) The compensation of state paid personnel appointed pursuant to this article shall be paid in equal installments by the council as provided by this subsection from funds appropriated for such purpose. The council may authorize employees compensated pursuant to this Code section to participate in voluntary salary deductions as provided by Article 3 of Chapter 7 of Title 45.

(6) The governing authority of the county or counties comprising a judicial circuit may supplement the salary or fringe benefits of any state paid position appointed pursuant to this article.

(7) The governing authority of any municipality within the judicial circuit may, with the approval of the circuit public defender, supplement the salary or fringe benefits of any state paid position appointed pursuant to this article. (Code 1981, § 17-12-30, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2005, p. ES3, § 23; Ga. L. 2007, p. 65, § 4/SB 139; Ga. L. 2009, p. 745, § 2/SB 97; Ga. L. 2011, p. 91, § 13/HB 238; Ga. L. 2012, p. 446, § 2-20/HB 642.)

The 2009 amendment, effective July 1, 2009, substituted "State Personnel Administration" for "State Merit System of Personnel Administration" in subsection (a) and paragraph (c)(1).

The 2011 amendment, effective July 1, 2011, substituted "policies" for "policies, rules, or regulations" near the end of paragraph (c)(4).

The 2012 amendment, effective July 1, 2012, substituted "as defined by Code

Section 45-20-2" for "of the State Personnel Administration" in subsection (a); and substituted "adopted pursuant to the rules of the State Personnel Board" for "adopted by the State Personnel Administration" in the second sentence of paragraph (c)(1).

Editor's notes. — Ga. L. 2012, p. 446, § 3-1/HB 642, not codified by the General Assembly, provides that: "Personnel, equipment, and facilities that were as-

signed to the State Personnel Administration as of June 30, 2012, shall be transferred to the Department of Administrative Services on the effective date of this Act." This Act became effective July 1, 2012.

Ga. L. 2012, p. 446, § 3-2/HB 642, not

codified by the General Assembly, provides that: "Appropriations for functions which are transferred by this Act may be transferred as provided in Code Section 45-12-90."

17-12-36. Alternate delivery system; annual review of operations by council; record keeping.

(a) The council may permit a judicial circuit composed of a single county to continue in effect an alternative delivery system to the one set forth in this article if:

(1) The delivery system:

(A) Has a full-time director and staff and had been fully operational for at least two years on July 1, 2003; or

(B) Is administered by the county administrative office of the courts or the office of the court administrator of the superior court and had been fully operational for at least two years on July 1, 2003;

(2) The council, by majority vote of the entire council, determines that the delivery system meets or exceeds its policies and standards, including, without limitation, caseload standards, as the council adopts;

(3) The governing authority of the county comprising the judicial circuit enacts a resolution expressing its desire to continue its delivery system and transmits a copy of such resolution to the council not later than September 30, 2004; and

(4) The governing authority of the county comprising the judicial circuit enacts a resolution agreeing to fully fund its delivery system.

(b) A judicial circuit composed of a single county may request an alternative delivery system only one time; provided, however, that if such judicial circuit's request for an alternative delivery system was disapproved on or before December 31, 2004, such judicial circuit may make one further request on or before September 1, 2005. The council shall allow such judicial circuit to have a hearing on such judicial circuit's request.

(c) The council shall make a determination with regard to continuation of an alternative delivery system not later than December 1, 2005, and if the council determines that such judicial circuit's alternative delivery system does not meet the standards as established by the council, the council shall notify such judicial circuit of its deficiencies in writing and shall allow such judicial circuit an opportunity to cure such

deficiencies. The council shall make a final determination with regard to continuation of an alternative delivery system on or before December 31, 2005. Initial and subsequent approvals of alternative delivery systems shall be by a majority vote of the entire council.

(d) Any circuit whose alternative delivery system is disapproved at any time shall be governed by the provisions of this article other than this Code section.

(e) In the event an alternative delivery system is approved, the council shall annually review the operation of such system and determine whether such system is meeting the standards as established by the council and is eligible to continue operating as an approved alternative delivery system. In the event the council determines that such system is not meeting the standards as established by the council, the council shall provide written notice to such system of the deficiencies and shall provide such system an opportunity to cure such deficiencies.

(f) In the event an alternative delivery system is approved, it shall keep and maintain appropriate records, which shall include the number of persons represented; the offenses charged; the outcome of each case; the expenditures made in providing services; and any other information requested by the council.

(g) In the event the council disapproves an alternative delivery system either in its initial application or annual review, such system may appeal such decision to the Supreme Court of Georgia under such rules and procedures as shall be prescribed by the Supreme Court.

(h) An approved alternative delivery system shall be paid by the council, from funds available to the council, in an amount equal to the amount that would have been allocated to the judicial circuit for the minimum salary of the circuit public defender, the assistant circuit public defenders, the investigator, and the administrative staff, exclusive of benefits, if the judicial circuit was not operating an alternative delivery system. (Code 1981, § 17-12-36, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2005, p. ES3, § 24; Ga. L. 2005, p. 910, § 2/HB 366; Ga. L. 2008, p. 846, §§ 37, 38/HB 1245; Ga. L. 2011, p. 91, § 14/HB 238.)

The 2011 amendment, effective July 1, 2011, substituted “policies” for “rules, regulations, policies,” near the middle of paragraph (a)(2).

ARTICLE 3

ASSISTANCE BY THIRD-YEAR LAW STUDENTS OR STAFF
INSTRUCTORS

Law reviews. — For article, “See One, in the Law School Curriculum,” see 26 Ga. Do One, Teach One: Dissecting the Use of St. U. L. Rev. 361 (2010). Medical Education’s Signature Pedagogy

ARTICLE 4

VERIFICATION OF INDIGENCY

17-12-80. Verification of indigency required; procedure; timing of notification of eligibility.

(a) In order to retain funding as provided in Code Sections 15-21-74 and 15-21A-6, a governing authority shall verify that the applicant qualifies as an indigent person. The governing authority shall establish the methodology for verification and fund such process. The governing authority shall produce auditable information to the council to substantiate its verification process as requested by the council or its director.

(b) The council shall establish policies and standards to determine approval of an indigent person verification system and shall annually provide written notification to the Georgia Superior Court Clerks’ Cooperative Authority as to whether or not a governing authority has an approved indigent person verification system.

(c) The governing authority shall advise the circuit public defender, if applicable, or the administrator of the indigent defense system for the jurisdiction of the name of each person who has applied for legal services and provide identifying information for those persons who are financially eligible for services within one business day of such person’s application for services. (Code 1981, § 17-12-80, enacted by Ga. L. 2008, p. 846, § 41/HB 1245; Ga. L. 2011, p. 91, § 15/HB 238.)

The 2011 amendment, effective July 1, 2011, substituted “policies and standards” for “rules and regulations” near the beginning of subsection (b).

CHAPTER 13

CRIMINAL EXTRADITION

ARTICLE 2

UNIFORM CRIMINAL EXTRADITION ACT

17-13-30. Rights of accused person; application for writ of habeas corpus; hearing; penalty.

JUDICIAL DECISIONS

Habeas corpus relief denied.

Georgia habeas court did not err by not examining a probable cause determination by a Washington magistrate because extradition documents were facially valid, a defendant had four felony charges pending in Washington, the defendant was the

same person named in the extradition documents, and the defendant was a fugitive from Washington authorities; there was sufficient prima facie evidence to show that the defendant was a fugitive from justice. *Smith v. State*, 284 Ga. 356, 667 S.E.2d 95 (2008).

CHAPTER 14

RESTITUTION AND DISTRIBUTION OF PROFITS TO VICTIMS OF CRIMES

Article 1 Restitution

offender as condition of relief generally.

Sec.

17-14-3. Requirement of restitution by

ARTICLE 1

RESTITUTION

17-14-2. Definitions.

JUDICIAL DECISIONS

Measure of damages for restitution.

Trial court did not err in ordering the defendant to pay the victim restitution after the defendant pled guilty to arson in the first degree because the trial court was authorized to find that the preponderance of the evidence showed that the victim owned the house at the time of the fire,

and evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property; the evidence of the background of the victim, a real estate investor who repaired houses personally, provided some evidence to show that the investor had

knowledge, experience, or familiarity with the cost of repairs, the value of real estate, and the extent of the damages to the investor's property pursuant to O.C.G.A. § 24-9-66. *Mayfield v. State*, 307 Ga. App. 630, 705 S.E.2d 717 (2011).

Restitution for crime which defendant was not charged or convicted. — When a defendant pled guilty in Georgia to forgery after trying to cash a check stolen during a burglary in Tennessee, the restitution part of the sentence was illegal under O.C.G.A. § 17-14-2(2) because the state was seeking restitution for the burglary, for which the defendant had not been charged or convicted in Georgia. Furthermore, because the sentence was illegal, the defendant did not waive appeal of the sentence by entering into a negotiated plea. *Smith v. State*, 292 Ga. App. 689, 665 S.E.2d 399 (2008).

Restitution not paid directly to victim. — Under O.C.G.A. § 17-14-2(9), the trial court could properly order the defendant to make restitution to a charitable fund instead of directly to the victim, as

the fund incurred expenses as a result of the defendant's conduct. *Adams v. State*, 291 Ga. App. 681, 662 S.E.2d 782 (2008), overruled on other grounds, *Turner v. State*, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Modification of restitution may be ordered by the trial court at any time.

— Trial court erred in dismissing a defendant's motion to modify restitution until the time came for the defendant to pay. Under O.C.G.A. § 17-14-12, the ordering authority, in this case, the trial court pursuant to O.C.G.A. § 17-14-2, retained jurisdiction to modify the restitution order at any time before the expiration of the relief ordered. *Wright v. State*, 302 Ga. App. 136, 690 S.E.2d 259 (2010).

Cited in *McClure v. State*, 295 Ga. App. 465, 673 S.E.2d 856 (2009); *Zipperer v. State*, 299 Ga. App. 792, 683 S.E.2d 865 (2009); *Browning v. State*, 303 Ga. App. 805, 695 S.E.2d 291 (2010); *Elsasser v. State*, 313 Ga. App. 661, 722 S.E.2d 327 (2011).

17-14-3. Requirement of restitution by offender as condition of relief generally.

(a) Subject to the provisions of Code Section 17-14-10, notwithstanding the provisions contained in Chapter 11 of Title 15, and in addition to any other penalty imposed by law, a judge of any court of competent jurisdiction shall, in sentencing an offender, make a finding as to the amount of restitution due any victim, and order an offender to make full restitution to such victim.

(b) If the offender is placed on probation, including probation imposed pursuant to Chapter 11 of Title 15 or Article 3 of Chapter 8 of Title 42, or sentence is suspended, deferred, or withheld, restitution ordered under this Code section shall be a condition of that probation, sentence, or order.

(c) If the offender is granted relief by the Department of Juvenile Justice, Department of Corrections, or the State Board of Pardons and Paroles, the terms of any court order requiring the offender to make restitution to a victim shall be a condition of such relief in addition to any other terms or conditions which may apply to such relief. (Code 1933, § 27-3003, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2010, p. 214, § 5/HB 567.)

The 2010 amendment, effective July 1, 2010, substituted “shall, in sentencing an offender, make a finding as to the amount of restitution due any victim, and

order an offender to make full restitution to such victim” for “shall order an offender to make full restitution to any victim” near the end of subsection (a).

JUDICIAL DECISIONS

Condition of probation.

Trial court did not abuse the court’s discretion in allowing the defendant to pay the full amount of restitution over the course of the defendant’s entire probated sentence because allowing the defendant

to pay the significant amount of restitution over the course of the probation was a commonsense approach in view of the admittedly limited resources of the defendant. *Elsasser v. State*, 313 Ga. App. 661, 722 S.E.2d 327 (2011).

17-14-5. Restitution by juvenile delinquent; retention of jurisdiction to enforce order against juvenile after attainment of age 21; transfer of enforcement jurisdiction; parent’s obligation for restitution.

JUDICIAL DECISIONS

Restitution properly ordered.

O.C.G.A. § 17-14-5(b) expressly authorized restitution as a condition of the probation of a delinquent juvenile, and the nature and amount of restitution ordered,

\$ 4,968 in property damage caused by the juvenile’s tampering with a sprinkler head, was supported by a preponderance of the evidence. *In re W. J. F.*, 302 Ga. App. 361, 691 S.E.2d 271 (2010).

17-14-6. Setoff of prior total or partial restitution made to victim; reduction of award from the Crime Victims Compensation Board by the amount of restitution; payment of restitution to governmental entities that have compensated the victim.

JUDICIAL DECISIONS

Restitution order improper after settlement. — Trial court erred in sentencing defendant to pay restitution to the victim’s estate under O.C.G.A. § 17-14-6(b). The estate dismissed the es-

tate’s civil claims against the defendant with prejudice after the parties settled. *Taylor v. State*, 295 Ga. App. 689, 673 S.E.2d 7 (2009), *aff’d*, 286 Ga. 328, 687 S.E.2d 409 (2009).

17-14-7. Right of offender to offer restitution plan to ordering authority; consideration and adoption of plan; hearing to determine restitution; burden of proof; liability among multiple offenders; payment for multiple victims; waiver of victim's rights.

JUDICIAL DECISIONS

Written findings no longer required.

Georgia law no longer requires written findings on restitution. *Ezebuir v. State*, 308 Ga. App. 282, 707 S.E.2d 182 (2011).

Restitution order proper.

Trial court did not err in ordering the defendant to pay the victim restitution after the victim pled guilty to arson in the first degree because the trial court was authorized to find that the preponderance of the evidence showed that the victim owned the house at the time of the fire, and evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property; the evidence of the background of the victim, a real estate investor who repaired houses personally, provided some evidence to show that the investor had knowledge, experience, or familiarity with the cost of repairs, the value of real estate, and the extent of the damages to the investor's property pursuant to O.C.G.A. § 24-9-66. *Mayfield v. State*, 307 Ga. App. 630, 705 S.E.2d 717 (2011).

Evidence was sufficient to sustain an award of \$800 restitution under O.C.G.A. § 17-14-7(b) as a special condition of probation because in the course of the robbery with which the defendant was charged under O.C.G.A. § 16-8-40(a)(2), the defendant took \$500 cash and \$300 in money orders from the car of the victim. *Ezebuir v. State*, 308 Ga. App. 282, 707 S.E.2d 182 (2011).

Because the trial court's determination of the restitution amount was authorized by O.C.G.A. § 17-14-7(b) and did not unlawfully enhance a defendant's sentence, the defendant did not have a substantive right to have the restitution hearing held within a certain time; defendant waived the rights to be present and to confrontation by voluntarily choosing not to attend

the hearing. *Williams v. State*, 311 Ga. App. 152, 715 S.E.2d 440 (2011), cert. denied, 2012 Ga. LEXIS 69 (Ga. 2012).

Trial court did not err in assessing the value of a dog the defendant killed at \$3,000 because evidence of the knowledge, experience, and familiarity of a witness with the value of labrador retrievers trained to hunt created a basis for the value stated. *Futch v. State*, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

Waiver of right to restitution hearing. — Although the defendant had a right to a restitution hearing under O.C.G.A. § 17-14-7(b), the defendant waived that right by acquiescing in the trial court's restitution order in the expectation of receiving a more lenient sentence than that recommended by the state (which the defendant in fact did receive). *Cameron v. State*, 295 Ga. App. 670, 673 S.E.2d 59 (2009).

Waiver of error with respect to requirements of restitution hearing. — Defendant waived any error with respect to the statutory requirements of a restitution hearing under O.C.G.A. § 17-14-7(b) because the defendant was allowed to offer argument on the issue of restitution and did not object to the trial court proceeding to decide the issue of restitution at that time; nor did the defendant ask for a continuance, ask that a restitution hearing be set for a later date, or state that the defendant had evidence to present on the question of restitution. *Futch v. State*, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

Deciding restitution as part of sentencing hearing. — Defendant waived any error in the decision of the trial court to decide the question of restitution as a part of the sentencing hearing, rather than in a separate and distinct hearing, because the defendant did not object to the trial court proceeding to decide the issue of restitution at that time, nor did

the defendant ask for a continuance, ask that a restitution hearing be set for a later date, or state that the defendant had evidence to present on the question of restitution. *Ezebuio v. State*, 308 Ga. App. 282, 707 S.E.2d 182 (2011).

Defendant failed to present evidence of expenses. — Defendant, who pled guilty to theft by taking under O.C.G.A. § 16-8-2, could not argue that the trial court failed to consider the factors in O.C.G.A. § 17-14-10 in making a restitution order as the defendant did not meet the burden of proof under O.C.G.A. § 17-14-7 in establishing the defendant's expenses as the defendant only told the court that the defendant had to make monthly payments; the defendant made no response when asked if the defendant could make house payments and the like if half the defendant's monthly income was applied to the restitution order. *Wimpey v. State*, 297 Ga. App. 182, 676 S.E.2d 831 (2009).

Restitution inappropriate after state failed to prove value of vehicle. — Trial court erred in ordering the defendant to pay restitution after the defendant pled guilty to theft by receiving stolen property, a vehicle, because the state failed to prove the fair market value of a vehicle when no evidence was presented that the condition of the vehicle was considered in determining the value of the vehicle, which appeared to be based totally on the vehicle identification number; although an insurance company that was seeking to recover money from the defendant was forced to value the vehicle before the vehicle was recovered, that did not prevent the state from introducing evidence, such as testimony from the victim or others with such knowledge, concerning the condition of the vehicle at the time of the theft. *Browning v. State*, 303 Ga. App. 805, 695 S.E.2d 291 (2010).

Apportionment of restitution award not required. — With respect to a trial court's order of restitution to a

defendant under O.C.G.A. §§ 17-14-7 and 17-14-10, although the trial court was permitted to apportion liability between the defendant and another individual who was involved in the fake loan scheme, the court did not commit error by failing to do so as the evidence showed that the defendant was personally responsible for the greater amount of the total loss. *Turner v. State*, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Restitution order vacated because evidence of victim's damages inadequate. — With respect to a trial court's order of restitution to a defendant under O.C.G.A. § 17-14-10, the state failed to show the amount of restitution by a preponderance of the evidence pursuant to O.C.G.A. § 17-14-7 with respect to that portion of the award for "accounting/auditing/attorney fees," such that the order could not stand. *Turner v. State*, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Apportionment of restitution award not required. — With respect to a trial court's order of restitution to a defendant under O.C.G.A. §§ 17-14-7 and 17-14-10, although the trial court was permitted to apportion liability between the defendant and another individual who was involved in the fake loan scheme, the court did not commit error by failing to do so as the evidence showed that the defendant was personally responsible for the greater amount of the total loss. *Turner v. State*, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Restitution order vacated because evidence of victim's damages inadequate. — With respect to a trial court's order of restitution to a defendant under O.C.G.A. § 17-14-10, the state failed to show the amount of restitution by a preponderance of the evidence pursuant to O.C.G.A. § 17-14-7 with respect to that portion of the award for "accounting/auditing/attorney fees," such that the order could not stand. *Turner v. State*, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

17-14-8. Apportionment of payments for fines and restitution; payment to victims.

JUDICIAL DECISIONS

Amount vacated because conviction to which restitution order was attached was reversed. — Because the state failed to present sufficient evidence to support a finding that defendant, a mortgage consultant, did not intend to

perform the services paid for by a client, only that conviction, out of eight entered by the jury, and the restitution order attached to the conviction, had to be reversed. *Patterson v. State*, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

17-14-9. Amount of restitution.

JUDICIAL DECISIONS

Proof of amount.

With regard to a restitution judgment entered against a defendant with regard to the defendant's conviction for theft by taking of copper wire, under the preponderance of the evidence standard, the trial court did not abuse the court's discretion in concluding that the fair market value of the stolen wire was \$6,470 and in issuing a restitution order in that amount since the defendant failed to establish that the wire was merely scrap and the amount the defendant and the codefendant received from selling the stolen wire was irrelevant for purposes of the restitution order. *McClure v. State*, 295 Ga. App. 465, 673 S.E.2d 856 (2009).

Trial court erred in ordering the defendant to pay restitution after the defendant pled guilty to theft by receiving stolen property, a vehicle, because the state failed to prove the fair market value of a vehicle when no evidence was presented that the condition of the vehicle was considered in determining the value of the vehicle, which appeared to be based totally on the vehicle identification number; although an insurance company that was seeking to recover money from the defendant was forced to value the vehicle before the vehicle was recovered, that did not prevent the state from introducing evidence, such as testimony from the victim or others with such knowledge, concerning the condition of the vehicle at the time of the theft. *Browning v. State*, 303 Ga. App. 805, 695 S.E.2d 291 (2010).

Trial court did not err in ordering the

defendant to pay the victim restitution after the defendant pled guilty to arson in the first degree because the trial court was authorized to find that the preponderance of the evidence showed that the victim owned the house at the time of the fire, and evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property; the evidence of the background of the victim, a real estate investor who repaired houses personally, provided some evidence to show that the investor had knowledge, experience, or familiarity with the cost of repairs, the value of real estate, and the extent of the damages to the investor's property pursuant to O.C.G.A. § 24-9-66. *Mayfield v. State*, 307 Ga. App. 630, 705 S.E.2d 717 (2011).

Trial court did not err in assessing the value of a dog the defendant killed at \$3,000 because evidence of the knowledge, experience, and familiarity of a witness with the value of labrador retrievers trained to hunt created a basis for the value stated. *Futch v. State*, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

Amount not excessive. — An order requiring the defendant to pay \$15,000 in restitution did not violate O.C.G.A. § 17-14-9. Since the victim originally owed a nursing facility over \$17,000 before the amount was reduced because of Medicaid payments, and the defendant had converted at least \$7,200 belonging to the victim, the trial court could have required the defendant to pay about \$25,000

in restitution; the fact that some of these damages might be paid by third parties did not absolve the defendant of liability for making restitution. *Adams v. State*, 291 Ga. App. 681, 662 S.E.2d 782 (2008), overruled on other grounds, *Turner v. State*, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Evidence was sufficient to authorize judgment, etc.

Court upheld a restitution order based on a surgeon's testimony that a recommended surgical procedure that cost \$15,000 was not for cosmetic purposes but to allow the victim greater ease of movement, and based on evidence of the defendant's financial situation, the defendant's bachelor's and master's degrees, the defendant's employment, and the defendant's future earning potential as set forth in O.C.G.A. § 17-14-10. *Regent v. State*, 306 Ga. App. 616, 703 S.E.2d 81 (2010).

Trial court was authorized under O.C.G.A. § 17-14-9 to order the defendant to pay the victim's medical expenses as restitution for damages caused by the defendant's simple battery of the victim in

violation of O.C.G.A. § 16-5-23(a) because the court's finding that the victim was injured by and had incurred costs as a result of the defendant's criminal behavior toward the victim was not clearly erroneous; the order for restitution did not exceed the amount of costs the victim incurred, and even if others at the scene could have also kicked the victim, that did not negate the defendant's liability for damages caused by the defendant's role in the attack. *Elsasser v. State*, 313 Ga. App. 661, 722 S.E.2d 327 (2011).

Restitution not available for crime that did not cause damage. — Under O.C.G.A. §§ 17-14-2(2) and 17-14-9, restitution was not available for defendant's conviction for leaving the scene of an accident in violation of O.C.G.A. § 40-6-270(a) because the damage to the other vehicle was solely attributable to the collision between the cars; defendant's failure to stop after the collision neither caused nor contributed to the damage. *Zipperer v. State*, 299 Ga. App. 792, 683 S.E.2d 865 (2009).

RESEARCH REFERENCES

ALR. — Measure and elements of restitution to which victim is entitled under state criminal statute — payment for installation of alarm or locks or change of locks due to burglary, attempted burglary, or felonious breaking and entering, 44 ALR6th 301.

Propriety, measure, and elements of restitution to which victim is entitled under state criminal statute — cruelty to, killing, or abandonment of, animals, 45 ALR6th 435.

17-14-10. Factors to be considered by ordering authority in determining nature and amount of restitution.

JUDICIAL DECISIONS

Written findings no longer required.

Georgia law no longer requires written findings on restitution. *Ezebuio v. State*, 308 Ga. App. 282, 707 S.E.2d 182 (2011).

Trial court's failure to enter written findings with respect to a restitution award was not reversible error; based on an amendment to the restitution statutes in 2005, a trial court is no longer required to make written findings of fact concern-

ing the factors to be considered in determining the restitution amount as set forth in O.C.G.A. § 17-14-10. *Futch v. State*, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

Failure of defendant to offer evidence regarding ability to pay.

Defendant, who pled guilty to theft by taking under O.C.G.A. § 16-8-2, could not argue that the trial court failed to consider the factors in O.C.G.A. § 17-14-10 in making a restitution order as the defen-

dant did not meet the burden of proof under O.C.G.A. § 17-14-7 in establishing the defendant's expenses as the defendant only told the court that the defendant had to make monthly payments; the defendant made no response when asked if the defendant could make house payments and the like if half the defendant's monthly income was applied to the restitution order. *Wimpey v. State*, 297 Ga. App. 182, 676 S.E.2d 831 (2009).

Factors considered.

There was no error with respect to a trial court's order of restitution to a defendant upon the defendant's conviction as the trial court properly considered the defendant's current financial condition and future earning capacity, and all of the factors in O.C.G.A. § 17-14-10. *Turner v. State*, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Restitution order vacated because evidence on victim's damages was insufficient.

With respect to a trial court's order of restitution to a defendant under O.C.G.A. § 17-14-10, the state failed to show the amount of restitution by a preponderance of the evidence pursuant to O.C.G.A. § 17-14-7 with respect to that portion of the award for "accounting/auditing/attorney fees," such that the order could not

stand. *Turner v. State*, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Restitution order upheld as supported by the evidence. — Court upheld a restitution order based on a surgeon's testimony that a recommended surgical procedure that cost \$15,000 was not for cosmetic purposes but to allow the victim greater ease of movement, and based on evidence of defendant's financial situation, defendant's bachelor's and master's degrees, defendant's employment, and the defendant's future earning potential as set forth in O.C.G.A. § 17-14-10. *Regent v. State*, 306 Ga. App. 616, 703 S.E.2d 81 (2010).

Trial court was authorized under O.C.G.A. § 17-14-9 to order the defendant to pay the victim's medical expenses as restitution for damages caused by the defendant's simple battery of the victim in violation of O.C.G.A. § 16-5-23(a) because the court's finding that the victim was injured by and had incurred costs as a result of the defendant's criminal behavior toward the victim was not clearly erroneous; the order for restitution did not exceed the amount of costs the victim incurred. *Elsasser v. State*, 313 Ga. App. 661, 722 S.E.2d 327 (2011).

Cited in *Patterson v. State*, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

RESEARCH REFERENCES

ALR. — Measure and elements of restitution to which victim is entitled under state criminal statute — payment for installation of alarm or locks or change of locks due to burglary, attempted burglary, or felonious breaking and entering, 44 ALR6th 301.

Propriety, measure, and elements of restitution to which victim is entitled under state criminal statute — cruelty to, killing, or abandonment of, animals, 45 ALR6th 435.

17-14-11. Effect of restitution order on civil actions against offender; setoff of restitution payments against judgments in civil actions; admissibility in evidence of restitution orders or payments; determining setoff amount.

JUDICIAL DECISIONS

Cited in *Patterson v. State*, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

17-14-12. Modification of restitution order.**JUDICIAL DECISIONS**

Modification may be ordered at any time. — Trial court erred in dismissing a defendant's motion to modify restitution until the time came for the defendant to pay. Under O.C.G.A. § 17-14-12, the ordering authority, in this case, the trial court pursuant to O.C.G.A. § 17-14-2, re-

tained jurisdiction to modify the restitution order at any time before the expiration of the relief ordered. *Wright v. State*, 302 Ga. App. 136, 690 S.E.2d 259 (2010).

Cited in *Patterson v. State*, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

17-14-13. Manner of enforcement of restitution order generally; sanctions for failure to comply with order.**JUDICIAL DECISIONS**

Cited in *Patterson v. State*, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

ARTICLE 2**DISTRIBUTION OF PROFITS OF CRIMES****17-14-31. Contract regarding reenactment of crime; deposit of consideration in escrow; claim notification; notice of availability of escrow moneys; disposition of escrow moneys; actions taken to defeat purpose.****JUDICIAL DECISIONS**

Rights of those who kill by accident or negligence not impaired. — Statutes that embody the public policy of Georgia of prohibiting wrongdoers from profiting from their crimes, O.C.G.A. §§ 17-14-31, 33-25-13, and 53-1-5, only prevent those who feloniously and intentionally kill, O.C.G.A. § 53-1-5(a), or those who commit murder or voluntary manslaughter, O.C.G.A. § 33-25-13, from sharing, respectively, in the decedent's estate or insurance policy proceeds; if a public policy may be gleaned from these

statutes, it is a policy that prohibits those who commit murder or voluntary manslaughter from profiting from the victim's death, but these statutes do not impair the rights of those who kill by accident or negligence, who kill in self-defense or pursuant to any other legal justification, or who kill while legally insane because simply admitting to having committed a homicide does not make one a wrongdoer under Georgia law. *Bruscato v. O'Brien*, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

CHAPTER 15

VICTIM COMPENSATION

Sec.

- 17-15-1. Legislative intent.
- 17-15-2. Definitions.
- 17-15-5. Filing of claims; verification; contents.
- 17-15-6. Investigation; decision by director; review by board; report to claimant.
- 17-15-7. Persons eligible for awards.
- 17-15-8. Required findings; amount of award; rejection of claim; re-

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- ductions; exemption from garnishment and execution; exemption from treatment as ordinary income; effective date for awards; psychological counseling for relatives of deceased; memorials for victims of DUI homicide.
- 17-15-15. Responsibility for cost of forensic medical examination.

17-15-1. Legislative intent.

The General Assembly recognizes that many innocent persons suffer personal physical injury, serious mental or emotional trauma, severe financial hardship, or death as a result of criminal acts or attempted criminal acts. The General Assembly finds and determines that there is a need for assistance for such victims of crime. Accordingly, it is the General Assembly's intent that under certain circumstances aid, care, and assistance be provided by the state for such victims of crime. (Code 1981, § 17-15-1, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2009, p. 195, § 1/SB 172.)

The 2009 amendment, effective July 1, 2009, in the first sentence, inserted "serious mental or emotional trauma," in

the middle and added "or attempted criminal acts" at the end.

17-15-2. Definitions.

As used in this chapter, the term:

- (1) "Board" means the Criminal Justice Coordinating Council.
- (2) "Claimant" means any person filing a claim pursuant to this chapter.
- (3) "Crime" means:

(A) An act which constitutes hit and run as defined in Code Section 40-6-270, homicide by vehicle as defined in Code Section 40-6-393, serious injury by vehicle as defined in Code Section 40-6-394, or any act which constitutes a violation of Code Section 16-5-46 or Chapter 6 or Part 2 of Article 3 of Chapter 12 of Title 16, a violation of Code Section 16-5-70, or a violent crime as defined by state or federal law which results in physical injury, serious mental

or emotional trauma, or death to the victim and which is committed:

(i) In this state;

(ii) In a state which does not have a victims' compensation program, if the victim is a resident of this state; or

(iii) In a state which has compensated the victim in an amount less than the victim would be entitled to pursuant to this chapter, if the victim is a resident of this state;

(B) An act which constitutes international terrorism as defined in 18 U.S.C. Section 2331 which results in physical injury, serious mental or emotional trauma, or death to the victim, if the victim is a resident of this state and is outside the territorial boundaries of the United States when such act is committed; or

(C) An act of mass violence which results in physical injury, serious mental or emotional trauma, or death to the victim, if the victim is a resident of this state and is outside the territorial boundaries of the United States when such act is committed.

(4) "Direct service provider" means a public or nonprofit entity which provides aid, care, and assistance to a victim.

(5) "Director" means the director of the Criminal Justice Coordinating Council.

(6) "Forensic medical examination" means an examination provided to a person pursuant to subsection (c) of Code Section 16-6-1 or subsection (c) of Code Section 16-6-2 by trained medical personnel in order to gather evidence. Such examination shall include, but shall not be limited to:

(A) An examination for physical trauma;

(B) A determination as to the nature and extent of the physical trauma;

(C) A patient interview;

(D) Collection and evaluation of the evidence collected; and

(E) Any additional testing deemed necessary by the examiner in order to collect evidence and provide treatment.

(7) "Fund" means the Georgia Crime Victims Emergency Fund.

(8) "Investigator" means an investigator of the board.

(9) "Serious mental or emotional trauma" means a nonphysical injury which has been documented by a licensed mental health

professional and which meets the specifications promulgated by the board's rules and regulations relating to this type of trauma.

(10) "Victim" means a person who:

(A) Is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;

(B) Suffers a serious mental or emotional trauma as a result of being threatened with a crime which could result in physical injury or death;

(C) Suffers a serious mental or emotional trauma as a result of being present during the commission of a crime; or

(D) Suffers a serious mental or emotional trauma as a result of being trafficked for labor or sexual servitude as defined in Code Section 16-5-46. (Code 1981, § 17-15-2, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1994, p. 1800, § 1; Ga. L. 1997, p. 481, § 1; Ga. L. 2002, p. 843, § 2; Ga. L. 2009, p. 195, § 2/SB 172; Ga. L. 2011, p. 214, § 4/HB 503; Ga. L. 2011, p. 217, § 4/HB 200; Ga. L. 2012, p. 775, § 17/HB 942.)

The 2009 amendment, effective July 1, 2009, in paragraph (3), inserted "serious mental or emotional trauma," throughout the paragraph and, in subparagraph (3)(A), inserted "violation of Chapter 6 or Part 2 of Article 3 of Chapter 12 of Title 16, a violation of Code section 16-5-70, or a" near the middle; added paragraph (8); redesignated former paragraph (8) as present paragraph (9); and rewrote paragraph (9).

The 2011 amendments. — The first 2011 amendment, effective July 1, 2011, added present paragraph (6); and redesignated former paragraphs (6) through (9) as present paragraphs (7) through (10), respectively. The second 2011 amendment, effective July 1, 2011, inserted

"Code Section 16-5-46 or" in the middle of subparagraph (3)(A); deleted "or" at the end of subparagraph (9)(B); substituted "or" for the period at the end of subparagraph (9)(C); and added subparagraph (9)(D).

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, deleted "a" preceding "trained medical" in the first sentence of the introductory language of paragraph (6).

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 131 (2011). For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U. L. Rev. 131 (2011).

17-15-5. Filing of claims; verification; contents.

(a) A claim may be filed by a person eligible to receive an award, as provided in Code Section 17-15-7, or, if such person is a minor, by his parent or guardian. In any case in which the person entitled to make a claim is mentally incompetent, the claim may be filed on his behalf by his guardian or such other individual authorized to administer his estate.

(b) A claim must be filed by the claimant not later than one year after the occurrence of the crime upon which such claim is based or not later than one year after the death of the victim; provided, however, that, upon good cause shown, the board may extend that time for filing for a period not exceeding three years after such occurrence. Claims shall be filed in the office of the board in person or by mail.

(c) The claim shall be verified and shall contain the following:

(1) A description of the date, nature, and circumstances of the crime;

(2) A complete financial statement, including, but not limited to, the cost of medical care or burial expense, the loss of wages or support the victim has incurred or will incur, any other emergency expenses incurred by the victim, and the extent to which the victim has been or may be indemnified for these expenses from any source;

(3) When appropriate, a statement indicating the extent of any disability resulting from the injury or serious mental or emotional trauma incurred;

(4) An authorization permitting the board to verify the contents of the application; and

(5) Such other information as the board may require. (Code 1981, § 17-15-5, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1997, p. 481, § 2; Ga. L. 2005, p. 88, § 6/HB 172; Ga. L. 2009, p. 195, § 3/SB 172.)

The 2009 amendment, effective July 1, 2009, inserted “or serious mental or emotional trauma” near the end of paragraph (c)(3).

17-15-6. Investigation; decision by director; review by board; report to claimant.

(a) A claim, once accepted for filing and completed, shall be assigned to an investigator. The investigator shall examine the papers filed in support of the claim and cause an investigation to be conducted into the validity of the claim. The investigation shall include, but not be limited to, an examination of law enforcement, court, and official records and reports concerning the crime and an examination of medical, psychiatric, counseling, financial, and hospital reports relating to the injury, serious mental or emotional trauma, or loss upon which the claim is based. All claims arising from the death of an individual as a direct result of a crime must be considered together by a single investigator.

(b) Claims must be investigated and determined regardless of whether the alleged criminal has been apprehended, prosecuted, or convicted of any crime based upon the same incident or whether the alleged criminal has been acquitted or found not guilty of the crime in question.

(c) The investigator conducting the investigation shall file with the director a written report setting forth a recommendation and the investigator's reason therefor. The director shall render a decision and furnish the victim or claimant with a copy of the report if so requested. In cases where an investigative report is provided, information deemed confidential in nature shall be excluded.

(d) The claimant may, within 30 days after receipt of the report of the decision of the director, make an application in writing to the director for review of the decision.

(e) Upon receipt of an application for review pursuant to subsection (d) of this Code section, the director shall forward all relevant documents and information to the board. The board shall review the records and affirm or modify the decision of the director. If considered necessary by the board or if requested by the claimant, the board shall order a hearing prior to rendering a decision. At the hearing, any relevant evidence not legally privileged is admissible. The board shall render a decision within 90 days after completion of the investigation. If the director receives no application for review pursuant to subsection (d) of this Code section, the director's decision becomes final.

(f) The board, for purposes of this chapter, may subpoena witnesses, administer or cause to be administered oaths, and examine such parts of the books and records of the parties to proceedings as relate to questions in dispute.

(g) The director shall, within ten days after receipt of the board's final decision, make a report to the claimant including a copy of the final decision and the reasons why the decision was made. (Code 1981, § 17-15-6, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1994, p. 1800, § 4; Ga. L. 2009, p. 195, § 4/SB 172.)

The 2009 amendment, effective July 1, 2009, in subsection (a), substituted "shall" for "must" in the first sentence and, in the third sentence, inserted "psychiatric, counseling," and inserted ", serious mental or emotional trauma," near the end.

17-15-7. Persons eligible for awards.

(a) Except as otherwise provided in this Code section, the following persons are eligible for awards pursuant to this chapter:

- (1) A victim;
- (2) A dependent spouse or child of a victim;

(2.1) For purposes of an award under subsection (k) of Code Section 17-15-8, any member of the immediate family of a victim of homicide by vehicle caused by a violation of Code Section 40-6-391;

(3) Any person who goes to the aid of another and suffers physical injury, serious mental or emotional trauma, or death as a direct result of acting, not recklessly, to prevent the commission of a crime, to apprehend lawfully a person reasonably suspected of having committed a crime, or to aid the victim of a crime or any person who is injured, traumatized, or killed while aiding or attempting to aid a law enforcement officer in the prevention of crime or apprehension of a criminal at the officer's request;

(4) Any person who is a victim of family violence as defined by Code Section 19-13-1 and anyone who is a victim as a result of a violation of Code Section 40-6-391; or

(5) Any person who is not a direct service provider and who assumes the cost of an eligible expense of a victim regardless of such person's relationship to the victim or whether such person is a dependent of the victim.

(b)(1) Victims may be legal residents or nonresidents of this state. A surviving spouse, parent, or child who is legally dependent for his or her principal support upon a deceased victim is entitled to file a claim under this chapter if the deceased victim would have been so entitled, regardless of the residence or nationality of the surviving spouse, parent, or child.

(2) Victims of crimes occurring within this state who are subject to federal jurisdiction shall be compensated on the same basis as resident victims of crime.

(c) No award of any kind shall be made under this chapter to a victim injured while confined in any federal, state, county, or municipal jail, prison, or other correctional facility.

(d) No award of any kind shall be made under this chapter to a victim of a crime which occurred prior to July 1, 1989.

(e) A person who is criminally responsible for the crime upon which a claim is based or is an accomplice of such person shall not be eligible to receive an award with respect to such claim; provided, however, that such ineligibility shall not apply if the claimant is a victim as defined in subparagraph (D) of paragraph (10) of Code Section 17-15-2.

(f) There shall be no denial of compensation to a victim based on that victim's familial relationship with the person who is criminally responsible for the crime.

(g) No award of any kind shall be made under this chapter to a victim of a crime for loss of property.

(h) A victim or claimant who has been convicted of a felony involving criminally injurious conduct and who is currently serving a sentence

therefor shall not be considered eligible to receive an award under this chapter. For purposes of this subsection, “criminally injurious conduct” means an act which occurs or is attempted in this state that results in physical injury, serious mental or emotional trauma, or death to a victim, which act is punishable by fine, imprisonment, or death. Such term shall not include acts arising out of the operation of motor vehicles, boats, or aircraft unless the acts were committed with the intent to inflict injury, trauma, or death or unless the acts committed were in violation of Code Section 40-6-391. For the purposes of this subsection, a person shall be deemed to have committed criminally injurious conduct notwithstanding that by reason of age, insanity, drunkenness, or other reason, he or she was legally incapable of committing a crime. (Code 1981, § 17-15-7, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, § 3; Ga. L. 1994, p. 1800, § 5; Ga. L. 1997, p. 481, § 3; Ga. L. 2004, p. 709, § 3; Ga. L. 2009, p. 195, § 5/SB 172; Ga. L. 2011, p. 217, § 5/HB 200.)

The 2009 amendment, effective July 1, 2009, in paragraph (a)(3), inserted “, serious mental or emotional trauma,” at the beginning and inserted “, traumatized,” near the end; and, in subsection (h), substituted “physical injury, serious mental or emotional trauma,” for “personal injury” in the second sentence and inserted “, trauma,” in the third sentence.

The 2011 amendment, effective July 1, 2011, added the proviso at the end of subsection (e).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2011, “paragraph (10)” was substituted for “paragraph (9)” near the end of subsection (e).

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 131 (2011). For article, “Crimes and Offenses: Crimes Against the Person,” see 28 Ga. St. U. L. Rev. 131 (2011).

17-15-8. Required findings; amount of award; rejection of claim; reductions; exemption from garnishment and execution; exemption from treatment as ordinary income; effective date for awards; psychological counseling for relatives of deceased; memorials for victims of DUI homicide.

(a) No award may be made unless the board or director finds that:

(1) A crime was committed;

(2) The crime directly resulted in the victim’s physical injury, serious mental or emotional trauma, or financial hardship as a result of the victim’s physical injury, serious mental or emotional trauma, or the victim’s death;

(3) Police records, records of an investigating agency, or records created pursuant to a mandatory reporting requirement show that the crime was promptly reported to the proper authorities. In no case may an award be made where the police records, records of an

investigating agency, or records created pursuant to a mandatory reporting requirement show that such report was made more than 72 hours after the occurrence of such crime unless the board, for good cause shown, finds the delay to have been justified and provided, further, that good cause shall be presumed if the claimant is a victim as defined in subparagraph (D) of paragraph (10) of Code Section 17-15-2; and

(4) The applicant has pursued restitution rights against any person who committed the crime unless the board or director determines that such action would not be feasible.

The board, upon finding that any claimant or award recipient has not fully cooperated with all law enforcement agencies, may deny, reduce, or withdraw any award.

(b) Any award made pursuant to this chapter may be in an amount not exceeding actual expenses, including indebtedness reasonably incurred for medical expenses, loss of wages, funeral expenses, mental health counseling, or support for dependents of a deceased victim necessary as a direct result of the injury or hardship upon which the claim is based.

(c)(1) Notwithstanding any other provisions of this chapter, no award made under the provisions of this chapter shall exceed \$1,000.00 in the aggregate; provided, however, with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 1994, no award made under the provisions of this chapter payable to a victim and to all other claimants sustaining economic loss because of injury to or death of such victim shall exceed \$5,000.00 in the aggregate; provided, further, with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 1995, no award made under the provisions of this chapter payable to a victim and to all other claimants sustaining economic loss because of injury to or death of such victim shall exceed \$10,000.00 in the aggregate; provided, further, with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 2002, no award made under the provisions of this chapter payable to a victim and to all other claimants sustaining economic loss because of injury to or death of such victim shall exceed \$25,000.00 in the aggregate; provided, further, with respect to any claim filed with the board for serious mental or emotional trauma, no award shall be made for a crime occurring before July 1, 2009.

(2) No award under this chapter for the following losses shall exceed the maximum amount authorized:

<u>Category</u>	<u>Maximum Award</u>
Lost wages	\$ 10,000.00

Funeral expenses	3,000.00
Financial hardship or loss of support	10,000.00
Medical	15,000.00
Counseling	3,000.00
Crime scene sanitization	1,500.00

(d) In determining the amount of an award, the director and board shall determine whether because of his or her conduct the victim of such crime contributed to the infliction of his or her injury, serious mental or emotional trauma, or financial hardship, and the director and board may reduce the amount of the award or reject the claim altogether in accordance with such determination.

(e) The director and board may reject an application for an award when the claimant has failed to cooperate in the verification of the information contained in the application.

(f) Any award made pursuant to this chapter may be reduced by or set off by the amount of any payments received or to be received as a result of the injury, serious mental or emotional trauma:

(1) From or on behalf of the person who committed the crime; and

(2) From any other private or public source, including an award of workers' compensation pursuant to the laws of this state,

provided that private sources shall not include contributions received from family members or persons or private organizations making charitable donations to a victim.

(g) No award made pursuant to this chapter is subject to garnishment, execution, or attachment other than for expenses resulting from the injury or serious mental or emotional trauma which is the basis for the claim.

(h) An award made pursuant to this chapter shall not constitute a payment which is treated as ordinary income under either the provisions of Chapter 7 of Title 48 or, to the extent lawful, under the United States Internal Revenue Code.

(i) Notwithstanding any other provisions of this chapter to the contrary, no awards from state funds shall be paid prior to July 1, 1989.

(j) In any case where a crime results in death, the spouse, children, parents, or siblings of such deceased victim may be considered eligible for an award for the cost of psychological counseling which is deemed necessary as a direct result of said criminal incident. The maximum

award for said counseling expenses shall not exceed \$3,000.00 for each claimant identified in this subsection.

(k)(1) In addition to any other award authorized by this Code section, in any case where a deceased was a victim of homicide by vehicle caused by a violation of Code Section 40-6-391 on any road which is part of the state highway system, upon request of the next of kin of the deceased, an award of compensation in the form of a memorial sign erected by the Department of Transportation as provided by this subsection shall be paid to an eligible claimant.

(2) The provisions of paragraph (4) of subsection (a) of this Code section shall not apply for purposes of eligibility for awards made under this subsection, and the value of any award paid to a claimant under this subsection shall not apply toward or be subject to any limitation on award amounts paid to any claimant under other provisions of this Code section.

(3) The Department of Transportation, upon receiving payment for the cost of materials and labor from the board, shall upon request of the next of kin of the deceased erect a sign memorializing the deceased on the right of way of such public highway at the location of the accident or as near thereto as safely and reasonably possible and shall maintain such sign for a period of five years from the date the sign is erected unless its earlier removal is requested in writing by the next of kin. Such sign shall be 24 inches wide by 36 inches high and depict a map of the State of Georgia, with a dark blue background and a black outline of the state boundaries. A border of white stars shall be placed on the inside of the state boundaries, and the sign shall contain the words "In Memory of (name), DUI Victim (date of accident)."

(4) In the event of multiple such claims arising out of a single motor vehicle accident, the names of all deceased victims for whom such claims are made and for whom a request has been made by the next of kin of the deceased may be placed on one such sign or, if necessary, on one such sign and a plaque beneath of the same color as the sign. In the event of multiple claims relating to the same deceased victim, no more than one such sign shall be paid for and erected for such victim. (Code 1981, § 17-15-8, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, §§ 4, 5; Ga. L. 1994, p. 1800, § 6; Ga. L. 1995, p. 385, § 1; Ga. L. 1997, p. 481, § 4; Ga. L. 2002, p. 843, § 3; Ga. L. 2004, p. 631, § 17; Ga. L. 2004, p. 709, § 4; Ga. L. 2009, p. 195, § 6/SB 172; Ga. L. 2011, p. 217, § 6/HB 200.)

The 2009 amendment, effective July 1, 2009, throughout this Code section, inserted "serious mental or emotional trauma,"; in subsection (a), in paragraph

(a)(2), inserted "or" and inserted "serious mental or emotional trauma," near the end, in paragraph (a)(3), inserted " , records of an investigating agency, or re-

cords crated pursuant to a mandatory reporting requirement” in the first sentence and inserted “, records of an investigating agency, or records created pursuant to a mandatory reporting requirement” in the second sentence; in paragraph (c)(1), substituted “further” for “however” and added the ending proviso; in subsections (d) and (f), inserted a comma; in subsection (g), inserted “or”; and, in subsection (j), substituted “for each claimant identified in this subsection” for “in the aggregate” at the end.

The 2011 amendment, effective July 1, 2011, inserted “and provided, further,

that good cause shall be presumed if the claimant is a victim as defined in subparagraph (D) of paragraph (9) of Code Section 17-15-2” near the end of paragraph (a)(3).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2011, “paragraph (10)” was substituted for “paragraph (9)” near the end of paragraph (a)(3).

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 131 (2011). For article, “Crimes and Offenses: Crimes Against the Person,” see 28 Ga. St. U. L. Rev. 131 (2011).

17-15-15. Responsibility for cost of forensic medical examination.

When a forensic medical examination is conducted, the cost of such examination shall be paid for by the fund in an amount not to exceed \$1,000.00. The fund shall be responsible for payment of such cost notwithstanding whether the person receiving such examination has health insurance or any other source of health care coverage. (Code 1981, § 17-15-15, enacted by Ga. L. 2011, p. 214, § 5/HB 503.)

Effective date. — This Code section became effective July 1, 2011.

CHAPTER 16

DISCOVERY

Article 1

Definitions; Felony Cases

Sec.

17-16-4. (Effective January 1, 2013. See note.) Disclosure required by

prosecuting attorney and defendant; inspections allowed; reducing oral reports to writing; continuing duty to disclose; discovery creating threat of physical or economic harm.

ARTICLE 1

DEFINITIONS; FELONY CASES

17-16-1. Definitions.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008).

JUDICIAL DECISIONS

Oral additional recollections by caseworker properly admitted. —

With regard to a defendant's convictions on two counts of cruelty to children, the trial court did not err by allowing a caseworker to testify to additional recollections the caseworker realized were not contained in the report that was prepared following an interview with the defendant as the information that the defendant asserted that the defendant should have received before trial did not involve a written statement, a written summary of a statement, or a contemporaneous recording of a statement by the caseworker; therefore, the recollections did not constitute a "statement of a witness" under O.C.G.A. § 17-16-1(2), and the state was not obligated to produce the information prior to trial under O.C.G.A. § 17-16-7. *Hinds v. State*, 296 Ga. App. 80, 673 S.E.2d 598 (2009).

No right to source code of breath test machine. — In a DUI case, the defendant was not entitled to discovery of the "source code" used to program a breath test machine. The defendant did not show that the code was in the possession, custody, or control of the state as required by O.C.G.A. §§ 17-16-1(1) and 17-16-23(b). *Hills v. State*, 291 Ga. App. 873, 663 S.E.2d 265 (2008).

Waiver of objections.

Trial court did not err in admitting statements the defendant's coconspirators made during the commission of a crime because the defendant did not allege or show bad faith under O.C.G.A. § 17-16-6 and did not request a continuance upon learning of the alleged discovery violation; the defendant proceeded under the reciprocal discovery provisions of O.C.G.A. § 17-16-1 et seq., and audiotapes of wire-

tap communications that transpired between a confidential informant and the coconspirators were not introduced at trial since the State relied upon U.S. Drug Enforcement Administration agents' testimony describing the communications. *Kohler v. State*, 300 Ga. App. 692, 686 S.E.2d 328 (2009).

Application of criminal discovery statute.

"Notes and summaries" made by a mitigation specialist who is working at the direction of trial counsel in a death penalty case should be regarded as "notes or summaries made by counsel" within the meaning of the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1(2)(C); therefore, a death penalty defendant's ability to employ a mitigation specialist to assist in investigation is not unduly hampered by the criminal discovery procedure. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Counsel not ineffective for failing to engage in reciprocal discovery. —

Defendant had not shown that counsel was ineffective for not engaging in reciprocal discovery under O.C.G.A. § 17-16-1. The defendant offered no evidence that counsel was unprepared or unaware of the salient evidence before trial and had not shown that the outcome would have been different had counsel opted into discovery. *Anuforo v. State*, 293 Ga. App. 1, 666 S.E.2d 50 (2008).

Cited in *Johnson v. State*, 293 Ga. App. 32, 666 S.E.2d 452 (2008); *Theophile v. State*, 295 Ga. App. 517, 672 S.E.2d 479 (2009); *Wright v. State*, 285 Ga. 428, 677 S.E.2d 82 (2009); *Scott v. State*, 298 Ga. App. 376, 680 S.E.2d 482 (2009); *Patterson v. State*, 312 Ga. App. 793, 720 S.E.2d 278 (2011).

17-16-2. Applicability of article.

Law reviews. — For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide

to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U. L. Rev. 995 (2007).

JUDICIAL DECISIONS

Cited in *Fyfe v. State*, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

17-16-4. (Effective until January 1, 2013) Disclosure required by prosecuting attorney and defendant; inspections allowed; reducing oral reports to writing; continuing duty to disclose; discovery creating threat of physical or economic harm.

Law reviews. — For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008). For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008). For note and comment, “Hope for the

Best and Prepare for the Worst: The Capital Defender’s Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials,” see 23 Ga. St. U. L. Rev. 995 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
STATE’S DUTY TO COMPLY
TIME OF RECEIPT OF STATEMENTS
SCIENTIFIC REPORTS
STATE’S DUTY TO COMPLY WITH REQUEST
WAIVER

General Consideration

Since a trial court found that there was no bad faith, etc.

Trial court did not abuse the court’s discretion in denying defendant’s claim that the destruction of blood samples constituted a failure by the state to comply with the reciprocal discovery requirements pursuant to O.C.G.A. § 17-16-4 since the defendant failed to show that the state acted in bad faith. *Clay v. State*, 725 S.E.2d 260, No. S11A1956, 2012 Ga. LEXIS 301 (2012).

Written notice required.

Because state’s written notice sufficiently notified defendant of its intent to seek recidivist sentence under O.C.G.A. § 17-10-7 upon conviction of felony obstruction of an officer, and during plea negotiations state again referenced defendant’s prior criminal history and reiterated it would seek recidivist punishment, no error occurred in imposing the sentence based on lack of notice. *Evans v. State*, 290 Ga. App. 746, 660 S.E.2d 841 (2008).

Notice of intent sufficient for recidivist punishment. — Defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7(c) because the prosecutor properly served under O.C.G.A. § 17-16-4(a)(5) the state’s notice of intent to seek recidivist punishment and introduce evidence of the defendant’s prior convictions on defense counsel on the first day of trial; any defects or untimeliness in the notice were waived as certified copies of the convictions were admitted without objection. *Howard v. State*, 297 Ga. App. 316, 677 S.E.2d 375 (2009).

State timely filed the state’s notice of intent to use the defendant’s prior convictions in aggravation of punishment pursuant to O.C.G.A. § 17-10-7(c) because the state provided the notice four days before trial; the state served and filed the state’s notice of intent on March 20, 2008, and trial commenced on March 24. *Shindorf v. State*, 303 Ga. App. 553, 694 S.E.2d 177 (2010).

Trial counsel did not err in failing to object to the state’s notice of the state’s intent to seek recidivist sentencing under

O.C.G.A. § 17-16-4(a)(5) because although the state did not give notice ten days before trial, the state did give the defendant notice before the beginning of the trial; trial counsel was aware of the defendant's criminal record, and the defendant made no showing that the prior convictions could have been rebutted or explained had counsel objected. *Ross v. State*, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

Failure to provide statement harmless error.

Even if a discovery violation occurred in the defendant's criminal trial pursuant to O.C.G.A. § 17-16-4(a)(1), as the defendant failed to show any harm by the state's alleged failure to timely produce recordings of jail telephone conversations by a codefendant, there was no reversible error; the state did not seek to introduce evidence of the recordings and the defendant's counsel received copies during the trial. *Taylor v. State*, 296 Ga. App. 212, 674 S.E.2d 81 (2009).

No ineffective assistance of counsel for failing to pursue fingerprint expert. — Defendant failed to show that defendant's trial counsel's failure to obtain a continuance to challenge fingerprint evidence was the result of deficient performance because the defendant could not show prejudice resulting from the lack of opportunity for expert review of the fingerprint report when no expert testified at the motion for new trial hearing, and without that testimony, the court of appeals could not evaluate whether there was a reasonable probability that the outcome of the proceeding could have been different; the trial court noted in the new trial hearing that counsel's strategy was to contest the occurrence of any kidnapping offense and concede the lesser crimes, and further analyzing the fingerprint evidence was not material to the trial strategy. *Thornton v. State*, 305 Ga. App. 692, 700 S.E.2d 669 (2010).

Ineffective assistance of counsel.

Defense counsel was not ineffective for failing to object to the state's introduction of evidence in aggravation of punishment on the ground that the notice was untimely and that the state had failed to list specifically what convictions were to be

introduced. By filing notice five days before trial, the state had given timely notice under O.C.G.A. § 17-16-4, and the state, counsel, and the trial court had discussed the prior convictions in detail at two pretrial hearings more than 60 days before trial. *McClam v. State*, 291 Ga. App. 697, 662 S.E.2d 790 (2008), cert. denied, 2008 Ga. LEXIS 798 (Ga. 2008).

Cited in *Beck v. State*, 292 Ga. App. 472, 665 S.E.2d 701 (2008); *Taylor v. State*, 295 Ga. App. 689, 673 S.E.2d 7 (2009); *Wright v. State*, 285 Ga. 428, 677 S.E.2d 82 (2009); *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011).

State's Duty to Comply

Videotaped statements without sound. — State did not fail to comply with O.C.G.A. § 17-16-4(a)(1) in not producing videotaped interviews of a witness and a defendant until three days prior to trial in the defendant's prosecution for felony murder because due to an equipment malfunction both recordings were soundless; the defendant failed to show how the interviews had any exculpatory value. *Vega v. State*, 285 Ga. 32, 673 S.E.2d 223 (2009).

Statements given while in police custody.

With regard to defendant's convictions on one count of simple assault and two counts of battery resulting from a fight with a romantic friend (the victim), trial court did not err by admitting testimony by an officer as to what defendant said to the officer, where state had failed to disclose substance of the statement to defendant until first day of trial as, considering that the victim failed to answer the subpoena and to appear at trial, and state being advised that defendant was going to assert self-defense, defendant did not show that state acted in bad faith. *Thompson v. State*, 291 Ga. App. 355, 662 S.E.2d 135 (2008).

Time of Receipt of Statements

Late disclosure of witness statement not done in bad faith. — Due to interpretation difficulties, the state did not know that the defendant held a knife during an armed robbery until the Thursday before trial. As the state's disclosure

to the defendant of this newly discovered evidence by at least the following Monday complied with O.C.G.A. § 17-16-4(c), the state did not act in bad faith, and the defendant was not prejudiced by the late disclosure; thus, evidence of the knife was properly admitted. *Herieia v. State*, 297 Ga. App. 872, 678 S.E.2d 548 (2009).

Oral additional recollections by a caseworker. — With regard to a defendant's convictions on two counts of cruelty to children, the trial court did not err by allowing a caseworker to testify to additional recollections the caseworker realized were not contained in the report that was prepared following an interview with the defendant as the information that the defendant asserted that the defendant should have received before trial did not involve a written statement, a written summary of a statement, or a contemporaneous recording of a statement by the caseworker; therefore, the recollections did not constitute a "statement of a witness" under O.C.G.A. § 17-16-1(2), and the state was not obligated to produce the information prior to trial under O.C.G.A. § 17-16-7. *Hinds v. State*, 296 Ga. App. 80, 673 S.E.2d 598 (2009).

Scientific Reports

Prosecutorial misconduct.

Prosecution did not violate O.C.G.A. § 17-16-4 by failing to turn over the recordings of the defendant's conversations because the prosecutor did not access the jail's telephone monitoring system, which was under the dominion of the county jail and, thus, there was nothing in the prosecutor's possession, custody, or control to turn over to the defendant. *Kitchens v. State*, 289 Ga. 242, 710 S.E.2d 551 (2011).

Service of scientific reports not required.

With regard to a defendant's trial on various drug charges, the trial court did not err by refusing to exclude the evidence of a crime lab report for the methamphetamine allegedly sold based upon defense counsel not receiving a copy of the report as the record showed that the prosecution provided the defense with a certificate of service showing that the state served defense counsel with the crime lab results and the certificate of service also included

the handwritten note that defense counsel was free to inspect the report at any time. The prosecution was not obligated to serve a copy of the lab report upon the defense and the defendant failed to prove bad faith on the part of the state and prejudice to the defense. *Rogers v. State*, 298 Ga. App. 895, 681 S.E.2d 693 (2009).

Trial court did not err in admitting testimony and evidence relating to the second and third reports of an investigator who compared the latent fingerprints taken from the scene of the crime with the defendant's fingerprints and confirmed a match of the defendant's fingers because the state did not act in bad faith by failing to provide the second and third reports to the defendant prior to trial; the second report was provided to the defendant in discovery from the state, and the third report revealed newly discovered evidence, which the state did not discover until the investigator enlarged the defendant's fingerprint on charts in the investigator's preparation for trial, and as soon as the state received the third report from the state's investigator, the state provided the report to defendant pursuant to O.C.G.A. § 17-16-4(c). *Mallory v. State*, 306 Ga. App. 684, 703 S.E.2d 120 (2010).

Failure to provide summary of basis for expert opinions. — Trial court did not err by ordering the defendant's psychologist to provide the state with a copy of the interview notes upon which the psychologist was relying as the basis for the expert opinions because the defendant had not otherwise provided an updated "summary" of the basis for those opinions; during the psychologist's testimony, it became apparent that the psychologist was basing the expert testimony in part on additional interviews that the psychologist had conducted since the defendant had served the state with discovery. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

State's Duty to Comply with Request

Photographic evidence.

In a prosecution for aggravated assault with intent to rape, the fact that the state failed to produce photos of the victim's injuries 10 days before trial, as required

by O.C.G.A. § 17-16-4(a)(3), was not grounds for reversal since the defendant did not ask for a continuance, did not show prejudice, and did not show that the state acted in bad faith. *Murray v. State*, 293 Ga. App. 516, 667 S.E.2d 382 (2008).

Defendant did not show that defense counsel provided ineffective assistance by not objecting to the admission of photographs on the ground that the defense was not informed of the photographs in a timely manner, as required by O.C.G.A. § 17-6-4, because counsel did object on that ground, the objection was overruled, and that ruling was not appealed. *Taylor v. State*, 298 Ga. App. 145, 679 S.E.2d 371 (2009).

Waiver

Failure to request in camera inspection — In a child molestation conviction, after defendant determined during trial that the state had not informed the defendant of an additional interview conducted by the victim's counselor, the state did not violate the Georgia Reciprocal Discovery Act, O.C.G.A. § 17-16-4(a)(3)(a), by failing to provide this material because defendant had not requested an in camera inspection of the confidential therapist's records as required by O.C.G.A. § 49-5-41. *Waters v. State*, 303 Ga. App. 187, 692 S.E.2d 802 (2010).

Defendant's consent to move forward. — Defendant's counsel visited the defendant in jail prior to the trial and

expressed counsel's belief that the trial court would grant the defendant a continuance based upon the short period of time between counsel's receipt of the state's discovery and the scheduled trial date under O.C.G.A. § 17-16-4 since the state must disclose and make available certain discoverable materials no later than ten days prior to trial. Defendant and defense counsel came to the mutual decision to move forward with the trial as scheduled and the fact that the defendant later regretted making that choice did not afford the defendant the right to a new trial. *Hubert v. State*, 297 Ga. App. 71, 676 S.E.2d 436 (2009).

State's violation of O.C.G.A. § 17-16-4(a)(1) by failing to timely disclose the defendant's in-custody offer to bribe the victim not to testify did not mandate reversal as the defendant waived the right to assert this error by not requesting relief at trial under O.C.G.A. § 17-16-6. *Spencer v. State*, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

Trial court did not err in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7 because the notice of the state's intent to seek recidivist sentencing was served on defense counsel on the first day of trial prior to the jury being sworn, and certified copies of the convictions were admitted without objection; therefore, any defects or untimeliness in the notice under O.C.G.A. § 17-16-4(a)(5) were waived. *Ross v. State*, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

RESEARCH REFERENCES

ALR. — Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — weapons, 53 ALR6th 81.

Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — personal items other than weapons, 55 ALR6th 391.

17-16-4. (Effective January 1, 2013. See note.) Disclosure required by prosecuting attorney and defendant; inspections allowed; reducing oral reports to writing; continuing duty to disclose; discovery creating threat of physical or economic harm.

(a)(1) The prosecuting attorney shall, no later than ten days prior to trial, or at such time as the court orders, disclose to the defendant and

make available for inspection, copying, or photographing any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the state or prosecution and that portion of any written record containing the substance of any relevant oral statement made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer or member of the prosecuting attorney's staff. The prosecuting attorney shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant, before or after arrest, in response to interrogation by any person then known by the defendant to be a law enforcement officer or member of the prosecuting attorney's staff if the state intends to use that statement at trial. The prosecuting attorney shall also disclose to the defendant the substance of any other relevant written or oral statement made by the defendant while in custody, whether or not in response to interrogation. Statements of coconspirators that are attributable to the defendant and arguably admissible against the defendant at trial also shall be disclosed under this Code section. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, upon its motion, discovery of any similar such statement of any witness who was:

(A) At the time of the statement, so situated as an officer or employee as to have been legally able to bind the defendant in respect to conduct constituting the offense; or

(B) At the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been legally able to bind the defendant in respect to that alleged conduct in which the witness was involved.

(2) The prosecuting attorney shall, no later than ten days prior to trial, or as otherwise ordered by the court, furnish to the defendant a copy of the defendant's Georgia Crime Information Center criminal history, if any, as is within the possession, custody, or control of the state or prosecution. Nothing in this Code section shall affect the provisions of Code Section 17-10-2.

(3)(A) Except as provided in subparagraph (B) of this paragraph, the prosecuting attorney shall, no later than ten days prior to trial, or as otherwise ordered by the court, permit the defendant at a time agreed to by the parties or ordered by the court to inspect and copy or photograph books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof and to inspect and photograph buildings or places which are within the possession, custody, or control of the state or prosecution and are intended for use by the prosecuting attorney as evidence in

the prosecution's case-in-chief or rebuttal at the trial or were obtained from or belong to the defendant. Evidence that is within the possession, custody, or control of the Forensic Sciences Division of the Georgia Bureau of Investigation or other laboratory for the purpose of testing and analysis may be examined, tested, and analyzed at the facility where the evidence is being held pursuant to reasonable rules and regulations adopted by the Forensic Sciences Division of the Georgia Bureau of Investigation or the laboratory where the evidence is being held.

(B) With respect to any books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof which are within the possession, custody, or control of the state or prosecution and are intended for use by the prosecuting attorney as evidence in the prosecution's case-in-chief or rebuttal at the trial of any violation of Part 2 of Article 3 of Chapter 12 of Title 16, such evidence shall, no later than ten days prior to trial, or as otherwise ordered by the court, be allowed to be inspected by the defendant but shall not be allowed to be copied.

(4) The prosecuting attorney shall, no later than ten days prior to trial, or as otherwise ordered by the court, permit the defendant at a time agreed to by the parties or ordered by the court to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the state intends to introduce in evidence in its case-in-chief or in rebuttal the results of the physical or mental examination or scientific test or experiment. If the report is oral or partially oral, the prosecuting attorney shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions no later than ten days prior to trial. Nothing in this Code section shall require the disclosure of any other material, note, or memorandum relating to the psychiatric or psychological treatment or therapy of any victim or witness.

(5) The prosecuting attorney shall, no later than ten days prior to trial, or at such time as the court orders but in no event later than the beginning of the trial, provide the defendant with notice of any evidence in aggravation of punishment that the state intends to introduce in sentencing.

(b)(1) The defendant within ten days of timely compliance by the prosecuting attorney but no later than five days prior to trial, or as otherwise ordered by the court, shall permit the prosecuting attorney at a time agreed to by the parties or as ordered by the court to inspect and copy or photograph books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or

copies or portions thereof and to inspect and photograph buildings or places, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in the defense's case-in-chief or rebuttal at the trial.

(2) The defendant shall within ten days of timely compliance by the prosecuting attorney but no later than five days prior to trial, or as otherwise ordered by the court, permit the prosecuting attorney at a time agreed to by the parties or as ordered by the court to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the defendant intends to introduce in evidence in the defense's case-in-chief or rebuttal the results of the physical or mental examination or scientific test or experiment. If the report is oral or partially oral, the defendant shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions no later than five days prior to trial. Nothing in this Code section shall require the disclosure of any other material, note, or memorandum relating to the psychiatric or psychological treatment or therapy of any defendant or witness.

(3)(A) The defendant shall, no later than the announcement of the verdict of the jury or if the defendant has waived a jury trial at the time the verdict is published by the court, serve upon the prosecuting attorney all books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof and to inspect and photograph buildings or places which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in the presentence hearing.

(B) The defendant shall, no later than the announcement of the verdict of the jury or if the defendant has waived a jury trial at the time the verdict is published by the court, serve upon the prosecuting attorney all reports of any physical or mental examinations and scientific tests or experiments, including a summary of the basis for the expert opinions rendered in the reports, or copies thereof, if the defendant intends to introduce in evidence in the presentence hearing the results of the physical or mental examination or scientific test or experiment. If the report is oral or partially oral, the defendant shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions.

(C) The defendant shall, no later than five days before the trial commences, serve upon the prosecuting attorney a list of witnesses that the defendant intends to call as a witness in the presentence

hearing. No later than the announcement of the verdict of the jury or if the defendant has waived a jury trial at the time the verdict is published by the court, the defendant shall produce for the opposing party any statement of such witnesses that is in the possession, custody, or control of the defendants or the defendant's counsel that relates to the subject matter of the testimony of such witnesses unless such statement is protected from disclosure by the privilege contained in paragraph (5), (6), (7), or (8) of subsection (a) of Code Section 24-5-501.

(c) If prior to or during trial a party discovers additional evidence or material previously requested or ordered which is subject to discovery or inspection under this article, such party shall promptly notify the other party of the existence of the additional evidence or material and make this additional evidence or material available as provided in this article.

(d) Upon a sufficient showing that a discovery required by this article would create a substantial threat of physical or economic harm to a witness, the court may at any time order that the discovery or inspection be denied, restricted, or deferred or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court subject to further order of the court and to be made available to the appellate court in the event of an appeal.

(e) Discovery with respect to alibi witnesses shall be as provided for in Code Section 17-16-5. (Code 1981, § 17-16-4, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2; Ga. L. 2003, p. 154, §§ 5, 6; Ga. L. 2005, p. 20, § 13/HB 170; Ga. L. 2008, p. 829, § 2/HB 1020; Ga. L. 2011, p. 99, § 34/HB 24.)

The 2011 amendment, effective January 1, 2013, substituted "subsection (a) of Code Section 24-5-501" for "Code Section 24-9-21" at the end of subparagraph (b)(3)(C). See editor's note for applicability.

Editor's notes. — This Code section, as set forth above, is effective on January 1, 2013. For the version of this Code section effective until that date, see the bound volume.

Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

17-16-5. Alibi witnesses.**JUDICIAL DECISIONS****Failure to disclose.**

Exclusion of an alibi witness was proper as the record disclosed evidence of bad faith by the defense in failing to disclose the witness within 10 days of trial as required by O.C.G.A. § 17-16-5(a). Specific findings of fact regarding prejudice and bad faith had not been required as such findings were implicit in the trial court's decision to exclude the witness. *Theophile v. State*, 295 Ga. App. 517, 672 S.E.2d 479 (2009).

Failure to timely come forward with alibi defense. — Trial court did not abuse the court's discretion when the court excluded the defendant's alibi evidence, including the testimony of defendant's alibi witnesses, pursuant to O.C.G.A. § 17-16-6, because the defendant's failure to timely come forward with defendant's alibi defense constituted prejudice and bad faith; the state had notice of the alibi just three days before the start of trial, and although the defendant made the defendant's alibi witnesses available, at least one witness was uncooperative, further prejudicing the state. *Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

Preservation of alibi defense. — Trial court erred in finding that the defendant failed to properly preserve an alibi defense pursuant to O.C.G.A. § 17-16-5(a) because the defendant had not gone to trial. *Johnson v. State*, 313 Ga. App. 895, 723 S.E.2d 100 (2012).

Premature filing of notice of alibi not ineffective assistance. — In an armed robbery prosecution, trial counsel was not ineffective for disclosing the defendant's alibi defense before the prosecution filed a demand for notice of alibi under O.C.G.A. § 17-16-5(a) because counsel knew that such a demand was going to be filed, and the defendant was not prejudiced by the premature disclo-

sure. *Fuller v. State*, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009).

Exclusion of witness was error. — Exclusion of a defendant's alibi witness was error, although the defendant failed to give the state the required 10-days' notice pursuant to O.C.G.A. § 17-16-5(a), as there was no finding of bad faith by the defendant or prejudice to the state under O.C.G.A. § 17-16-6. *Ware v. State*, 298 Ga. App. 232, 679 S.E.2d 797 (2009).

Evidence did not warrant instruction on alibi. — Evidence did not warrant an instruction on alibi because the evidence proffered at trial was insufficient to warrant the trial court to give an instruction on alibi; the trial court properly excluded alleged evidence of an alibi because the defendant's failure to timely come forward with defendant's alibi defense constituted prejudice and bad faith. *Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

Failure to sustain appellate burden. — Trial court did not err in refusing to grant the defendant's requested remedy for the state's failure to respond to the defendant's notice of an alibi because although the state's provision of the state's general witness list did not satisfy the state's obligations under O.C.G.A. § 17-16-5(b); to be entitled to a new trial, the defendant was required to demonstrate what harm the defendant suffered as a result of the state's noncompliance, but the defendant showed no such harm; therefore, even assuming that the trial court erred, the defendant failed to sustain the defendant's appellate burden and reversal was not warranted. *Martinez v. State*, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

Cited in *Hargett v. State*, 285 Ga. 82, 674 S.E.2d 261 (2009).

17-16-6. Failure to comply with discovery requirements.

Law reviews. — For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008).

JUDICIAL DECISIONS

Witness excluded.

Trial court did not err in excluding a witness's testimony because the state was not informed of the witness as a possible witness until the third day of trial and had no opportunity to investigate the witness's testimony or background. Similarly, the trial court was authorized to find bad faith because defense counsel knew about the witness's existence and had a plan to call the witness as a potential witness prior to trial, and yet failed to inform the state about the witness until the third day of trial. *Hudson v. State*, 284 Ga. 595, 669 S.E.2d 94 (2008).

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the trial court did not err in excluding testimony from the defendant's proffered expert witness on police interrogation techniques and false confessions based on the state not being timely notified of that witness and because the area in which the expert would express an opinion had not reached a level of scientific reliability so as to allow the evidence. It was within the trial court's authority to exclude the expert's testimony for the defendant's failure to disclose the expert and there was no showing that the false confession theory and the interrogation method satisfied the evidentiary test in criminal cases set forth in case law. *Wright v. State*, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, U.S. , 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010).

Trial court did not abuse the court's discretion in denying the defendant's request to call a witness due to delay because the requirement of prejudice to the state under O.C.G.A. § 17-16-6 was satisfied since the state had no notice of the witness or a videotaped interview of a victim until the day of trial and, thus, had no opportunity to interview the witness, and the requirement of bad faith was

satisfied since nothing indicated that the defendant did not know of the witness or the videotape until the day of trial; O.C.G.A. § 17-16-6 does not require the trial court to make a finding of prejudice or bad faith. *Vaughn v. State*, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

Failure to timely come forward with alibi defense. — Trial court did not abuse the court's discretion when the court excluded the defendant's alibi evidence, including the testimony of defendant's alibi witnesses, pursuant to O.C.G.A. § 17-16-6, because the defendant's failure to timely come forward with defendant's alibi defense constituted prejudice and bad faith; the state had notice of the alibi just three days before the start of trial, and although the defendant made the defendant's alibi witnesses available, at least one witness was uncooperative, further prejudicing the state. *Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

Undisclosed witness allowed to testify. — Trial court did not abuse the court's discretion in permitting a witness to testify for the state although the witness was not included on the state's witness list because the defendant made no showing that the prosecutor acted in bad faith in failing to disclose the witness before trial, nor that the defendant was prejudiced by the omission of the witness from the witness list. *Childs v. State*, 287 Ga. 488, 696 S.E.2d 670 (2010).

State did not act in bad faith.

It could not be said that the state acted in bad faith or that the defendant was prejudiced; thus, a statement the defendant made to a coworker was properly admitted into evidence and the coworker allowed to testify at trial. When the state became aware six days before trial of the statement, the state immediately notified the defendant of the statement; two days later, the defendant was made aware of the fact that the state planned to use the

coworker as a witness; and the trial court stated that the court was willing to make the witness available to the defendant for an interview and to give the defendant all the time necessary to question the witness before the witness took the stand. *Holmes v. State*, 284 Ga. 330, 667 S.E.2d 71 (2008).

Due to interpretation difficulties, the state did not know that the defendant held a knife during an armed robbery until the Thursday before trial. As the state's disclosure to the defendant of this newly discovered evidence by at least the following Monday complied with O.C.G.A. § 17-16-4(c), the state did not act in bad faith, and the defendant was not prejudiced by the late disclosure; thus, evidence of the knife was properly admitted. *Herieia v. State*, 297 Ga. App. 872, 678 S.E.2d 548 (2009).

With regard to a defendant's trial on various drug charges, the trial court did not err by refusing to exclude the evidence of a crime lab report for the methamphetamine allegedly sold based upon defense counsel not receiving a copy of the report as the record showed that the prosecution provided the defense with a certificate of service showing that the state served defense counsel with the crime lab results and the certificate of service also included the handwritten note that defense counsel was free to inspect the report at any time. The prosecution was not obligated to serve a copy of the lab report upon the defense and the defendant failed to prove bad faith on the part of the state and prejudice to the defense. *Rogers v. State*, 298 Ga. App. 895, 681 S.E.2d 693 (2009).

Trial court did not err in admitting testimony and evidence relating to the second and third reports of an investigator who compared the latent fingerprints taken from the scene of the crime with the defendant's fingerprints and confirmed a match of the defendant's fingers because the state did not act in bad faith by failing to provide the second and third reports to the defendant prior to trial; the second report was provided to the defendant in discovery from the state, and the third report revealed newly discovered evidence, which the state did not discover until the investigator enlarged the defen-

dant's fingerprint on charts in the investigator's preparation for trial, and as soon as the state received the third report from the state's investigator, the state provided the report to defendant pursuant to O.C.G.A. § 17-16-4(c). *Mallory v. State*, 306 Ga. App. 684, 703 S.E.2d 120 (2010).

Trial court did not err by admitting the state's evidence despite various alleged discovery violations because the state disclosed all of the state's evidence to the defendant and provided the defendant with the indictment and witness list during a probation revocation hearing 24 days prior to trial, and the defendant was informed at the revocation hearing that the evidence was the same as the evidence would be at the defendant's impending criminal trial; further, there was no evidence of bad faith on the part of the state. *Fields v. State*, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

Trial court did not abuse the court's discretion in denying defendant's claim that the destruction of blood samples constituted a failure by the state to comply with the reciprocal discovery requirements pursuant to O.C.G.A. § 17-16-4 when the defendant failed to show that the state acted in bad faith. *Clay v. State*, 725 S.E.2d 260, No. S11A1956, 2012 Ga. LEXIS 301 (2012).

Because the record supported the trial court's ruling that the state did not act in bad faith with regard to disclosure of a witness's statement, the severe remedies that the defendant sought under O.C.G.A. § 17-16-6 were not applicable; the defendant had other, audiotaped statements of the witness and had interviewed the witness and obtained an affidavit from the witness before trial, and the trial court granted the defendant an overnight continuance to review the additional statement before cross-examining the witness. *Jones v. State*, 290 Ga. 576, 722 S.E.2d 853 (2012).

Showing of harm required for reversal of conviction.

In a prosecution for aggravated assault with intent to rape, the fact that the state failed to produce photos of the victim's injuries 10 days before trial, as required by O.C.G.A. § 17-16-4(a)(3), was not grounds for reversal as the defendant did

not ask for a continuance, did not show prejudice, and did not show that the state acted in bad faith. *Murray v. State*, 293 Ga. App. 516, 667 S.E.2d 382 (2008).

Exclusion of witness was error. — Exclusion of a defendant's alibi witness was error, although the defendant failed to give the state the required 10-days' notice pursuant to O.C.G.A. § 17-16-5(a), as there was no finding of bad faith by the defendant or prejudice to the state under O.C.G.A. § 17-16-6. *Ware v. State*, 298 Ga. App. 232, 679 S.E.2d 797 (2009).

Trial court erred in excluding a witness's testimony based solely on the fact that the witness was not listed on the defendant's witness list because the defendant was entitled to rely on the State's supplemental witness list as a document furnished to the defendant pursuant to the Criminal Discovery Act, O.C.G.A. § 17-16-10, and was not required to also list the witness on the defendant's own witness list in order to call the witness as a witness at trial; when the trial court excluded the testimony, it was not aware that the witness had been identified by the State on its supplemental witness list, but when ruling on the State's objection to the witness because of an alleged discovery violation on the part of the defense. The trial court did not require the State to make the requisite showing of prejudice and bad faith on the part of the defendant as required by the Act, O.C.G.A. § 17-16-6, and the State could not have shown prejudice or bad faith on the part of the defendant because the State admitted that it had the witness's report and had researched the validity of the specific tests utilized by the witness, and the error was not harmless since it could not be said that the testimony would not have made a difference in the outcome of what the trial court described as a "very, very close case." *Webb v. State*, 300 Ga. App. 611, 685 S.E.2d 498 (2009).

Continuance granted to review evidence. — In a defendant's child molestation trial, because a detective on the stand used notes that had not been disclosed in discovery, the trial court properly granted time for defense counsel to review the notes, pursuant to O.C.G.A. § 17-16-6. *McIntyre v. State*, 302 Ga. App. 778, 691 S.E.2d 663 (2010).

Failure to grant continuance.

Defendant was not entitled to a continuance or sanctions since, prior to trial: (1) defendant's attorney and the state viewed tapes of statements from both the defendant and defendant's ex-girlfriend victim in which they discussed their prior difficulty; (2) the state offered the defendant's attorney the opportunity to look at the state's files regarding the prior difficulty; (3) defendant and the defendant's attorney were well aware of the prior difficulty before defendant's trial began; (4) there was no evidence of the state's bad faith; (5) the victim was cross-examined; and (6) there was no evidence of prejudice. *Jackson v. State*, 270 Ga. App. 166, 605 S.E.2d 876 (2004).

Trial court did not abuse the court's discretion when the court refused to grant the defendant's motion for a continuance after the state violated the reciprocal discovery statute, O.C.G.A. § 17-16-1 et seq., because defense counsel attempted to interview three witnesses on the first day of trial and declined to seek another such opportunity despite the state's invitation to do so early on the second day, and although the witnesses declined an interview, defense counsel asked for no additional relief; the defendant failed to identify any testimony that was a surprise or to show that, with a continuance, the defendant would have uncovered helpful information that the defendant did not already know, and the defendant was able to use a prior inconsistent statement to impeach the one of the three witnesses who, they claimed, provided the testimony which was most beneficial for the state. *Norris v. State*, 289 Ga. 154, 709 S.E.2d 792 (2011).

Trial court did not abuse the court's broad discretion under O.C.G.A. § 17-16-6 by denying the defendant a continuance and refusing to exclude evidence for the untimeliness of discovery because the trial court used the court's judgment to fashion a remedy appropriate to a case in which there was a speedy trial demand and no other reasonable time to proceed with the rather lengthy trial within the constraints of that demand. *Higuera-Hernandez v. State*, 289 Ga. 553, 714 S.E.2d 236 (2011).

Failure to request relief.

State's violation of O.C.G.A. § 17-16-4(a)(1) by failing to timely to disclose the defendant's in-custody offer to bribe the victim not to testify did not mandate reversal as the defendant waived the right to assert this error by not requesting relief at trial under O.C.G.A. § 17-16-6. *Spencer v. State*, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

Trial court did not err in admitting statements the defendant's coconspirators made during the commission of a crime because the defendant did not allege or show bad faith under O.C.G.A. § 17-16-6 and did not request a continuance upon learning of the alleged discovery violation;

the defendant proceeded under the reciprocal discovery provisions of O.C.G.A. § 17-16-1 et seq., and audiotapes of wiretap communications that transpired between a confidential informant and the coconspirators were not introduced at trial since the state relied upon U.S. Drug Enforcement Administration agents' testimony describing the communications. *Kohler v. State*, 300 Ga. App. 692, 686 S.E.2d 328 (2009).

Cited in *Vega v. State*, 285 Ga. 32, 673 S.E.2d 223 (2009); *Hubert v. State*, 297 Ga. App. 71, 676 S.E.2d 436 (2009); *Day v. State*, 302 Ga. App. 883, 691 S.E.2d 920 (2010).

RESEARCH REFERENCES

ALR. — Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — weapons, 53 ALR6th 81.

Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — personal items other than weapons, 55 ALR6th 391.

17-16-7. Statements of witnesses.**JUDICIAL DECISIONS****Failure of the state to produce oral statements.**

Defendant was not entitled to a mistrial for the state's alleged violation of O.C.G.A. § 17-16-7 for withholding an oral statement by a witness because the state had merely interviewed the witness during the state's investigation and any oral statement was not recorded or otherwise committed to writing. *Parks v. State*, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

With regard to a defendant's convictions on two counts of cruelty to children, the trial court did not err by allowing a caseworker to testify to additional recollections the caseworker realized were not contained in the report that was prepared following an interview with the defendant as the information that the defendant asserted that the defendant should have received before trial did not involve a written statement, a written summary of a statement, or a contemporaneous recording of a statement by the caseworker; therefore, the recollections did not constitute a "statement of a witness" under

O.C.G.A. § 17-16-1(2), and the state was not obligated to produce the information prior to trial under O.C.G.A. § 17-16-7. *Hinds v. State*, 296 Ga. App. 80, 673 S.E.2d 598 (2009).

With regard to a defendant's murder conviction, the defendant's claim on appeal that the trial court erred by failing to strike, in its entirety, the testimony of the victim's sibling's friend based on the defendant's assertion that the state violated O.C.G.A. § 17-16-7 was found meritless. The statute did not apply to the friend's prior oral statement not recorded or memorialized in any way because it was not, in the words of the statute, "in the possession, custody, or control of the state or prosecution," thus, the friend's statement did not fall under the purview of the statute. *Henley v. State*, 285 Ga. 500, 678 S.E.2d 884, cert. denied, 130 S. Ct. 800, 175 L. Ed. 2d 559, 2009 U.S. LEXIS 8805 (2009).

Since there was no evidence in the record that any of the testifying witnesses gave the police or the prosecution a writ-

ten or recorded statement that was not produced to the defendant, there was no evidence that a discovery violation occurred with regard to witness statements. Although O.C.G.A. § 17-16-7 required the state to produce any statement of a witness that was in the possession or control of the state, this requirement applied only to statements that had either been recorded or committed to writing. *Walker v. State*, No. A11A2293, 2012 Ga. App. LEXIS 193 (Feb. 24, 2012).

State did not act in bad faith with regard to disclosure of witness statement. — Because the record supported the trial court's ruling that the state did not act in bad faith with regard to disclosure of a witness's statement, the severe remedies that the defendant sought under O.C.G.A. § 17-16-6 were not applicable; the defendant had other audiotaped statements of the witness and had interviewed the witness and obtained an affidavit from the witness before trial, and the trial court granted the defendant an overnight continuance to review the additional statement before cross-examining the witness. *Jones v. State*, 290 Ga. 576, 722 S.E.2d 853 (2012).

No duty to disclose. — Trial court did not err in denying the defendant's motion for mistrial on the grounds of

prosecutorial misconduct because the defendant failed to show that the prosecutor violated the law, prejudiced the defense, or committed any act that could be construed as misconduct; there was no evidence in the record that the victim's mother gave the police or the prosecution a written or recorded statement that the victim had told the mother that the victim had lied about the molestation, but if the mother had given an unrecorded oral statement to that effect to the prosecutor, the prosecutor was not obligated under O.C.G.A. § 17-16-7 to disclose it to the defense, and it was patent from the opening statement that the defendant intended to offer evidence in the defendant's defense that the victim had lied about the molestation and that some of that evidence would come from the victim's own mother. *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Failure to disclose ten days prior to trial statements of co-indictee. — State did not violate O.C.G.A. § 17-16-7 by not disclosing, ten days before trial, a co-indictee's statement that the defendant threatened the co-indictee because the statement was not known by the state until trial, when the co-indictee and a second co-indictee were placed in the same holding cell. *Silverio v. State*, 306 Ga. App. 438, 702 S.E.2d 717 (2010).

17-16-8. Lists of names and information concerning witnesses.

JUDICIAL DECISIONS

Even though a witness's name was not on the state's witness list, etc.

Trial court did not abuse the court's discretion in allowing two witnesses to testify regarding damages done to a business's gate at the defendant's trial for armed robbery, theft of a motor vehicle, and other crimes, who were not identified on the prosecutor's witness list as the manager of the location from which the defendant stole the vehicle and damaged the gate suffered a severe back injury the day before testifying. The trial court properly allowed defense counsel to interview the repairman and the bookkeeper, who did testify as to the gate's damages, and the defendant never requested a continu-

ance. *Johnson v. State*, 293 Ga. App. 32, 666 S.E.2d 452 (2008).

No surprise or prejudice.

With regard to defendant's conviction for burglary, the trial court did not abuse the court's discretion by allowing a government witness to testify even though the state failed to include the witness on the state's witness list because the witness was not a "surprise" witness or unknown to defendant; rather, the witness was a key element of defendant's own explanation for defendant's presence at the victims' home. Further, the trial court granted defense counsel an opportunity to interview the witness, and counsel asked for no additional relief following that in-

interview, and defendant did not argue or cite any evidence that the state's failure to list the witness as a witness resulted from bad faith. *Luker v. State*, 291 Ga. App. 434, 662 S.E.2d 240 (2008).

Trial court did not abuse the court's discretion in allowing a new witness for the state to testify at trial even though the state failed to disclose the witness at least ten days before trial in violation of O.C.G.A. § 17-16-8(a) because the defendant did not contend that the state acted in bad faith, and the defendant acknowledged in the defendant's appellate brief that the defendant believed that the state's failure to provide the name of the witness was unintentional; the defendant did not seek an opportunity to interview the witness despite the state's invitation for the defendant to do so. *Taylor v. State*, 305 Ga. App. 748, 700 S.E.2d 841 (2010).

Trial court did not abuse the court's discretion in denying the defendant's motion for a continuance and permitting the state's witnesses to testify because the defendant did not ask to interview the witnesses before the witnesses testified and did not contend that the defendant was surprised by the witnesses' testimony or prejudiced by not knowing earlier that the witnesses were going to testify; the defendant made no showing that the state acted in bad faith in failing to list the witnesses earlier. *Powers v. State*, No. A11A1814, 2012 Ga. App. LEXIS 271 (Mar. 12, 2012).

Timeliness.

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the trial court did not err in excluding testimony from the defendant's proffered expert witness on police interrogation techniques and false confessions based on the state not being timely notified of that witness and because the area in which the expert would express an opinion had not reached a level of scientific reliability so as to allow the testimony. It was within the trial court's authority to exclude the expert's testimony

for the defendant's failure to disclose the expert and there was no showing that the false confession theory and the interrogation method satisfied the evidentiary test in criminal cases set forth in case law. *Wright v. State*, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, U.S. , 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010).

Witness excluded.

Excluding a witness's testimony on the ground that the defendants did not comply with proper discovery procedures, in violation of O.C.G.A. § 17-16-8(a), was harmless error, if error at all, in light of the overwhelming evidence of the defendants' guilt. *Carter v. State*, 285 Ga. 394, 677 S.E.2d 71 (2009).

Witnesses who never testified. —

Although the defendant had sought a mistrial after the prosecutor announced on the fourth day of trial that one disclosed witness had told the prosecutor of additional incriminatory testimony and that a previously undisclosed witness, who had not yet been found, might testify, neither witness ever testified; thus, the denial of the motion for mistrial was moot. Moreover, as required by O.C.G.A. § 17-16-8(a), the trial court allowed the defendant to interview the disclosed witness. *Lankford v. State*, 295 Ga. App. 590, 672 S.E.2d 534 (2009).

In a case in which defendant argued that the trial court abused the court's discretion when the court denied defendant's motion for a mistrial, arguing that the state violated O.C.G.A. § 17-16-8(a) by failing to disclose identifying information concerning a witness, the state did not violate § 17-16-8 since the state could not locate the witness and did not call the witness at trial. *Manaois v. State*, 300 Ga. App. 176, 684 S.E.2d 315 (2009).

Issue waived. — Defendant waived the issue that the trial court erred in denying the defendant's motion for a continuance and permitting the state's witnesses to testify because the defendant withdrew an objection when a substitute officer was called as a witness. *Powers v. State*, No. A11A1814, 2012 Ga. App. LEXIS 271 (Mar. 12, 2012).

17-16-10. Material or information already furnished; who may be called as witness.

JUDICIAL DECISIONS

Trial court erred in excluding a witness's testimony based solely on the fact that the witness was not listed on the defendant's witness list because the defendant was entitled to rely on the State's supplemental witness list as a document furnished to the defendant pursuant to the Criminal Discovery Act, O.C.G.A. § 17-16-10, and was not required to also list the witness on the defendant's own witness list in order to call the witness as a witness at trial; when the trial court excluded the testimony, it was not aware that the witness had been identified by the State on its supplemental witness list, but when ruling on the State's objection to the witness because of an alleged discov-

ery violation on the part of the defense. The trial court did not require the State to make the requisite showing of prejudice and bad faith on the part of the defendant as required by the Act, O.C.G.A. § 17-16-6, and the State could not have shown prejudice or bad faith on the part of the defendant because the State admitted that it had the witness's report and had researched the validity of the specific tests utilized by the witness, and the error was not harmless since it could not be said that the testimony would not have made a difference in the outcome of what the trial court described as a "very, very close case." *Webb v. State*, 300 Ga. App. 611, 685 S.E.2d 498 (2009).

ARTICLE 2

MISDEMEANOR CASES

17-16-23. Right of defendant to copies of written scientific reports; failure to comply.

JUDICIAL DECISIONS

Source code for breath test machine. — In a DUI case, the defendant was not entitled to discovery of the "source code" used to program a breath test machine. The defendant did not show that the code was in the possession, custody, or control of the state as required by O.C.G.A. §§ 17-16-1(1) and 17-16-23(b). *Hills v. State*, 291 Ga. App. 873, 663 S.E.2d 265 (2008).

Breath test results, etc.

Trial court erred in granting the defendant's motion to suppress a breath test slip from an intoxilyzer and all testimony about the intoxilyzer because the state was not required to produce the breath test slip to defendant ten days before trial as a part of discovery since the breath test slip did not constitute a written scientific report within the meaning of O.C.G.A. § 17-16-23; no test or analysis was performed because the sample was insuffi-

cient, and the breath test slip did not show any test results but reflected only a measurement of breath volume. *State v. Tan*, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

Printout reflecting an "insufficient sample," and thus no analysis and no result is not subject to discovery under O.C.G.A. § 17-16-23 because if there is no test and no result, there is nothing to discover. *State v. Tan*, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

Admissibility of breath test slip. — Trial court erred in granting the defendant's motion to suppress a breath test slip from an intoxilyzer and all testimony about the intoxilyzer because no surprise occurred when the defendant's attorney had already been shown the breath test slip and cross-examined a police officer about the slip at the motion hearing, and the state agreed to provide the defendant a copy; although the better practice would

have been to provide the defendant a copy of the slip before the trial date, the record demonstrated that the state provided a copy at the hearing on the pretrial motion. *State v. Tan*, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

Receipt of breath test results from jail staff sufficient. — Court rejected a DUI defendant's argument that the trial court erred in allowing the state to admit the results of the defendant's breathalyzer test because the state failed to provide a

copy of the results to the defendant during discovery in violation of O.C.G.A. § 17-16-23; the uncontroverted evidence indicated that the defendant received a copy of the test results from the jail staff immediately after the results were recorded. *Jacobson v. State*, 306 Ga. App. 815, 703 S.E.2d 376 (2010), cert. denied, No. S11C0498, 2011 Ga. LEXIS 582 (Ga. 2011).

Cited in *Black v. State*, 309 Ga. App. 880, 711 S.E.2d 428 (2011).

CHAPTER 17

CRIME VICTIMS' BILL OF RIGHTS

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| <p>Sec.</p> <p>17-17-1. Declaration of policy.</p> <p>17-17-3. Definitions.</p> <p>17-17-5. Notification to victim of accused's arrest, release, judicial proceedings, escape, and violations of electronic release and monitoring program.</p> <p>17-17-5.1. Victim notification from Department of Behavioral Health and Developmental Disabilities.</p> <p>17-17-6. Notification to victim of accused's pretrial release and of victims' rights and the availability of victims' compensation and services.</p> <p>17-17-8. Notification by prosecuting attorney of legal procedures and of victim's rights in relation thereto; victims seeking restitution.</p> <p>17-17-8.1. Procedures for a victim to be interviewed by an accused or accused's attorney or agent; duties and conditions.</p> <p>17-17-9. (Effective until January 1,</p> | <p>Sec.</p> <p>2013. See note.) Exclusion of testifying victim from criminal proceedings; separate victims' waiting areas.</p> <p>17-17-9. (Effective January 1, 2013. See note.) Exclusion of testifying victim from criminal proceedings; separate victims' waiting areas.</p> <p>17-17-9.1. Protection of communications between victim assistance personnel and victims — Privilege.</p> <p>17-17-12. Notification to victim of accused's motion for new trial or appeal, release on bail or recognizance, appellate proceedings, and outcome of appeal; notifications regarding death penalty cases; victim's rights retained at new trial or on appeal.</p> <p>17-17-12.1. Requests to prevent an accused from sending any form of written, text, or electronic communication to the victim's family, or the victim.</p> |
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Cross references. — Notice of release of child from detention, § 15-11-51. Notice to victim of parole decision, § 42-9-43.

OPINIONS OF THE ATTORNEY GENERAL

Crime Victims' Bill of Rights, O.C.G.A. § 17-17-1 et seq., has only limited application to juvenile court proceedings which are governed primarily by the provisions

contained in O.C.G.A. T. 15, and the conclusion reached in 1996 Op. Att'y Gen. U96-1 remains. 2010 Op. Att'y Gen. No. 10-10.

17-17-1. Declaration of policy.

The General Assembly hereby finds and declares it to be the policy of this state that victims of crimes should be accorded certain basic rights just as the accused are accorded certain basic rights. These rights include:

- (1) The right to reasonable, accurate, and timely notice of any scheduled court proceedings or any changes to such proceedings;
- (2) The right to reasonable, accurate, and timely notice of the arrest, release, or escape of the accused;
- (3) The right not to be excluded from any scheduled court proceedings, except as provided in this chapter or as otherwise required by law;
- (4) The right to be heard at any scheduled court proceedings involving the release, plea, or sentencing of the accused;
- (5) The right to file a written objection in any parole proceedings involving the accused;
- (6) The right to confer with the prosecuting attorney in any criminal prosecution related to the victim;
- (7) The right to restitution as provided by law;
- (8) The right to proceedings free from unreasonable delay; and
- (9) The right to be treated fairly and with dignity by all criminal justice agencies involved in the case. (Code 1981, § 17-17-1, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 6/HB 567.)

The 2010 amendment, effective July 1, 2010, added "These rights include:" at the end of the first paragraph; and added paragraphs (1) through (9).

Law reviews. — For article, "Criminal Procedure," see 27 Ga. St. U. L. Rev. 29 (2011).

17-17-3. Definitions.

As used in this chapter, the term:

- (1) "Accused" means a person suspected of and subject to arrest for, arrested for, or convicted of a crime against a victim.

(1.1) "Arrest" means an actual custodial restraint of a person or the person's submission to custody and includes the taking of a child into custody.

(2) "Arresting law enforcement agency" means any law enforcement agency, other than the investigating law enforcement agency, which arrests the accused.

(3) "Compensation" means awards granted by the Georgia Crime Victims Compensation Board pursuant to Chapter 15 of this title.

(4) "Crime" means an act committed in this state which constitutes any violation of Chapter 5 of Title 16; Chapter 6 of Title 16; Article 1, 3, or 4 of Chapter 7 of Title 16; Article 1 or 2 of Chapter 8 of Title 16; Chapter 9 of Title 16; Part 3 of Article 3 of Chapter 12 of Title 16; Code Section 30-5-8; Code Section 40-6-393; Code Section 40-6-393.1; or Code Section 40-6-394.

(4.1) "Criminal justice agency" means an arresting law enforcement agency, custodial authority, investigating law enforcement agency, prosecuting attorney, or the State Board of Pardons and Paroles.

(5) "Custodial authority" means a warden, sheriff, jailer, deputy sheriff, police officer, correctional officer, officer or employee of the Department of Corrections or the Department of Juvenile Justice, or any other law enforcement officer having actual custody of the accused.

(6) "Investigating law enforcement agency" means the law enforcement agency responsible for the investigation of the crime.

(7) "Notice," "notification," or "notify" means a written notice when time permits or, failing such, a documented effort to reach the victim by telephonic or other means.

(8) "Person" means an individual.

(9) "Prompt notice," "prompt notification," or "promptly notify" means notification given to the victim as soon as practically possible so as to provide the victim with a meaningful opportunity to exercise his or her rights pursuant to this chapter.

(10) "Prosecuting attorney" means the district attorney, the solicitor-general of a state court or the solicitor of any other court, the Attorney General, a county attorney opposing an accused in a habeas corpus proceeding, or the designee of any of these.

(11) "Victim" means:

(A) A person against whom a crime has been perpetrated or has allegedly been perpetrated; or

(B) In the event of the death of the crime victim, the following relations if the relation is not either in custody for an offense or the defendant:

- (i) The spouse;
- (ii) An adult child if division (i) does not apply;
- (iii) A parent if divisions (i) and (ii) do not apply;
- (iv) A sibling if divisions (i) through (iii) do not apply; or
- (v) A grandparent if divisions (i) through (iv) do not apply; or

(C) A parent, guardian, or custodian of a crime victim who is a minor or a legally incapacitated person except if such parent, guardian, or custodian is in custody for an offense or is the defendant. (Code 1981, § 17-17-3, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 1996, p. 748, § 17; Ga. L. 1997, p. 1453, § 1; Ga. L. 2010, p. 214, § 7/HB 567.)

The 2010 amendment, effective July 1, 2010, added paragraphs (1.1) and (4.1); rewrote paragraph (4); and inserted “or has allegedly been perpetrated” near the end of subparagraph (11)(A).

17-17-5. Notification to victim of accused’s arrest, release, judicial proceedings, escape, and violations of electronic release and monitoring program.

(a) All victims, wherever practicable, shall be entitled to notification of:

- (1) The accused’s arrest;
- (2) The accused’s release from custody;
- (3) Any judicial proceeding at which the release of the accused will be considered;
- (4) An escape by the accused and his or her subsequent rearrest; and

(5) If the accused is released from custody and the terms or conditions of such release require that the accused participate in an electronic release and monitoring program, the accused’s violation of the terms or conditions of the electronic release and monitoring program, provided that an arrest warrant has been issued for the accused and the accused is prohibited from contacting the victim.

(b) No such notification shall be required unless the victim provides a current address and telephone number to which such notice can be directed.

(c) The criminal justice agency having knowledge of an event described in subsection (a) of this Code section shall provide notice to the victim of such event. Such agency shall advise the victim of his or her right to notification pursuant to this chapter and of the requirement of the victim's providing a current address and telephone number to which the notification shall be directed. Such victim shall transmit the telephone number described in this subsection to the appropriate criminal justice agency or custodial authority as provided for in this chapter. (Code 1981, § 17-17-5, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 8/HB 567.)

The 2010 amendment, effective July 1, 2010, substituted the present provisions of this Code section for the former provisions, which read: "(a) All victims, wherever practicable, shall be entitled to notification as defined by paragraph (7) of Code Section 17-17-3 of the accused's arrest, of the accused's release from custody, and of any judicial proceeding at which the release of the accused will be considered. No such notification shall be required unless the victim provides a landline telephone number other than a pocket pager or electronic communication device number to which such notice can be directed.

"(b) The investigating law enforcement agency, prosecuting attorney, or custodial

authority who is required to provide notification pursuant to this chapter shall advise the victim of his or her right to notification and of the requirement of the victim's providing a landline telephone number other than a pocket pager or electronic communication device number to which the notification shall be directed. Such victim shall transmit the telephone number described in this subsection to the appropriate investigating law enforcement agency, prosecuting attorney, or custodial authority as provided for in this chapter."

Law reviews. — For article, "Criminal Procedure," see 27 Ga. St. U. L. Rev. 29 (2011).

17-17-5.1. Victim notification from Department of Behavioral Health and Developmental Disabilities.

(a) If the accused is committed to the Department of Behavioral Health and Developmental Disabilities pursuant to the provisions of Part 2 of Article 6 of Chapter 7 of this title, the department shall, upon the written request of the victim, mail to the victim at least ten days before the release or discharge of the accused notice of the release or discharge of the accused.

(b) The Department of Behavioral Health and Developmental Disabilities shall mail to the victim immediately after the escape or subsequent readmission of the accused notice of such escape or subsequent readmission of the person who is placed by court order in the custody of the department pursuant to the provisions of Part 2 of Article 6 of Chapter 7 of this title. (Code 1981, § 17-17-5.1, enacted by Ga. L. 2010, p. 214, § 9/HB 567.)

Effective date. — This Code section Procedure,” see 27 Ga. St. U. L. Rev. 29 became effective July 1, 2010. (2011).

Law reviews. — For article, “Criminal

17-17-6. Notification to victim of accused’s pretrial release and of victims’ rights and the availability of victims’ compensation and services.

(a) Upon initial contact with a victim, all law enforcement and court personnel shall make available to the victim the following information written in plain language:

(1) The possibility of pretrial release of the accused, the victim’s rights and role in the stages of the criminal justice process, and the means by which additional information about these stages can be obtained;

(2) The availability of victim compensation and, if the victim has been trafficked for labor or sexual servitude as defined in Code Section 16-5-46, compensation available through the federal government pursuant to 22 U.S.C. Section 7105; and

(3) The availability of community based victim service programs.

(b) The Criminal Justice Coordinating Council is designated as the coordinating entity between various law enforcement agencies, the courts, and social service delivery agencies. The Criminal Justice Coordinating Council shall develop and disseminate written information upon which law enforcement personnel may rely in disseminating the information required by this chapter. (Code 1981, § 17-17-6, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2011, p. 217, § 7/HB 200.)

The 2011 amendment, effective July 1, 2011, inserted “and, if the victim has been trafficked for labor or sexual servitude as defined in Code Section 16-5-46, compensation available through the fed-

eral government pursuant to 22 U.S.C. Section 7105” in paragraph (a)(2).

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 131 (2011).

17-17-8. Notification by prosecuting attorney of legal procedures and of victim’s rights in relation thereto; victims seeking restitution.

(a) Upon initial contact with a victim, a prosecuting attorney shall give prompt notification to the victim of the following:

(1) The procedural steps in processing a criminal case including the right to restitution;

(2) The rights and procedures of victims under this chapter;

(3) Suggested procedures if the victim is subjected to threats or intimidation;

(4) The names and telephone numbers of contact persons at both the office of the custodial authority and in the prosecuting attorney's office; and

(5) The names and telephone numbers of contact persons at the office of the investigating agency where the victim may make application for the return of any of the victim's property that was taken during the course of the investigation, as provided by Code Section 17-5-50.

(b) If requested in writing by the victim and to the extent possible, the prosecuting attorney shall give prompt advance notification of any scheduled court proceedings and notice of any changes to that schedule. Court proceedings shall include, but not be limited to, pretrial commitment hearings, arraignment, motion hearings, trial, sentencing, restitution hearings, appellate review, and post-conviction relief. The prosecuting attorney shall notify all victims of the requirement to make such request in writing.

(c)(1) In the event the victim seeks restitution, the victim shall provide the prosecuting attorney with his or her legal name, address, phone number, social security number, date of birth, and, if the victim has an e-mail address, his or her e-mail address. The victim shall also provide such information, other than a social security number, to the prosecuting attorney for a secondary contact person in the event the victim cannot be reached after reasonable efforts are made to contact such victim. The prosecuting attorney shall advise the victim of any agency that will receive such information and advise the victim that he or she is responsible for updating such information with the prosecuting attorney while the case involving the victim is pending and that he or she should update the agency with such information after a restitution order has been entered.

(2) The prosecuting attorney shall transmit the information collected in paragraph (1) of this subsection to the Department of Corrections, Department of Juvenile Justice, or the State Board of Pardons and Paroles, as applicable, if an order of restitution is entered.

(3) The information collected pursuant to paragraph (1) of this subsection shall be treated as confidential and shall not be disclosed to any person outside of the disclosure provided by this subsection; such information shall not be subject to Article 4 of Chapter 18 of Title 50, relating to open records, or subject to subpoena, discovery, or introduction into evidence in any civil or criminal proceeding. (Code 1981, § 17-17-8, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 10/HB 567.)

The 2010 amendment, effective July 1, 2010, added “including the right to restitution” at the end of paragraph (a)(1); deleted “and” at the end of paragraph (a)(3); substituted “; and” for a period at

the end of paragraph (a)(4); added paragraph (a)(5); inserted “restitution hearings,” near the end of the second sentence of subsection (b); and added subsection (c).

17-17-8.1. Procedures for a victim to be interviewed by an accused or accused’s attorney or agent; duties and conditions.

(a) A victim shall have the right to refuse to submit to an interview by the accused, the accused’s attorney, or an agent of the accused. It shall be the duty of the prosecuting attorney to advise a victim that he or she has the right to agree to such an interview or to refuse such an interview.

(b) If a victim agrees to be interviewed, such victim may set conditions for such interview as he or she desires. Conditions may include, but shall not be limited to, the time, date, and location of the interview, what other persons may be present during the interview, any security arrangements for the interview, and whether or not the interview may be recorded. If requested by a victim, the prosecuting attorney or his or her agent may attend the interview. A victim has the right to terminate the interview at any time or to refuse to answer any question during the interview.

(c) The accused, the accused’s attorney, and any agent of the accused shall not contact a victim in an unreasonable manner; and if a victim has clearly expressed to any such party a desire not to be contacted, no contact shall be made. When making any permissible contact with the victim, the accused’s attorney or an agent of the accused shall make a clear statement that he or she is contacting the victim on behalf of the accused.

(d) For the purposes of this Code section, a peace officer shall not be considered a victim if the act that would have made the officer a victim occurs while the peace officer is acting within the scope of the officer’s official duties.

(e) Except as provided in this Code section, the prosecuting attorney shall not take any action to deny an accused’s attorney access to a victim for the purpose of interviewing such victim. (Code 1981, § 17-17-8.1, enacted by Ga. L. 2010, p. 214, § 11/HB 567.)

Effective date. — This Code section became effective July 1, 2010.

17-17-9. (Effective until January 1, 2013. See note.) Exclusion of testifying victim from criminal proceedings; separate victims' waiting areas.

(a) A victim has the right to be present at all criminal proceedings in which the accused has the right to be present. A victim or member of the immediate family of a victim shall not be excluded from any portion of any hearing, trial, or proceeding pertaining to the offense based solely on the fact that such person is subpoenaed to testify unless it is established that such victim or family member is a material and necessary witness to such hearing, trial, or proceeding and the court finds that there is a substantial probability that such person's presence would impair the conduct of a fair trial. The provisions of this Code section shall not be construed as impairing the authority of a judge to remove a person from a trial or hearing or any portion thereof for the same causes and in the same manner as the rules of court or law provides for the exclusion or removal of the accused. A motion to exclude a victim or family members from the courtroom for any reason other than misconduct shall be made and determined prior to jeopardy attaching.

(b) A victim of a criminal offense who has been or may be subpoenaed to testify at such hearing or trial shall be exempt from the provisions of Code Section 24-9-61 requiring sequestration; provided, however, that the court shall require that the victim be scheduled to testify as early as practical in the proceedings.

(c) If the victim is excluded from the courtroom, the victim shall have the right to wait in an area separate from the accused, from the family and friends of the accused, and from witnesses for the accused during any judicial proceeding involving the accused, provided that such separate area is available and its use in such a manner practical. If such a separate area is not available or practical, the court, upon request of the victim made through the prosecuting attorney, shall attempt to minimize the victim's contact with the accused, the accused's relatives and friends, and witnesses for the accused during any such judicial proceeding. (Code 1981, § 17-17-9, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 12/HB 567.)

The 2010 amendment, effective July 1, 2010, added subsections (a) and (b); designated the existing provisions as subsection (c); and substituted "If the victim is excluded from the courtroom, the victim" for "The victim" at the beginning of the first sentence of subsection (c).

Code Commission notes. — Pursuant

to Code Section 28-9-5, in 2010, "the" was inserted preceding "same manner" in the third sentence of subsection (a).

Editor's notes. — Code Section 17-17-9 is set out twice in this Code. The first version is effective until January 1, 2013, and the second version becomes effective on that date.

17-17-9. (Effective January 1, 2013. See note.) Exclusion of testifying victim from criminal proceedings; separate victims' waiting areas.

(a) A victim has the right to be present at all criminal proceedings in which the accused has the right to be present. A victim or member of the immediate family of a victim shall not be excluded from any portion of any hearing, trial, or proceeding pertaining to the offense based solely on the fact that such person is subpoenaed to testify unless it is established that such victim or family member is a material and necessary witness to such hearing, trial, or proceeding and the court finds that there is a substantial probability that such person's presence would impair the conduct of a fair trial. The provisions of this Code section shall not be construed as impairing the authority of a judge to remove a person from a trial or hearing or any portion thereof for the same causes and in the same manner as the rules of court or law provides for the exclusion or removal of the accused. A motion to exclude a victim or family members from the courtroom for any reason other than misconduct shall be made and determined prior to jeopardy attaching.

(b) A victim of a criminal offense who has been or may be subpoenaed to testify at such hearing or trial shall be exempt from the provisions of Code Section 24-6-616 requiring sequestration; provided, however, that the court shall require that the victim be scheduled to testify as early as practical in the proceedings.

(c) If the victim is excluded from the courtroom, the victim shall have the right to wait in an area separate from the accused, from the family and friends of the accused, and from witnesses for the accused during any judicial proceeding involving the accused, provided that such separate area is available and its use in such a manner practical. If such a separate area is not available or practical, the court, upon request of the victim made through the prosecuting attorney, shall attempt to minimize the victim's contact with the accused, the accused's relatives and friends, and witnesses for the accused during any such judicial proceeding. (Code 1981, § 17-17-9, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 12/HB 567; Ga. L. 2011, p. 99, § 35/HB 24.)

The 2011 amendment, effective January 1, 2013, substituted "Code Section 24-6-616" for "Code Section 24-9-61" in the middle of subsection (b). See editor's note for applicability.

Editor's notes. — Code Section 17-17-9 is set out twice in this Code. The first version is effective until January 1,

2013, and the second version becomes effective on that date.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article on the

2011 amendment of this Code section, see
28 Ga. St. U. L. Rev. 1 (2011).

17-17-9.1. Protection of communications between victim assistance personnel and victims — Privilege.

Communications between a victim, other than a peace officer, and victim assistance personnel appointed by a prosecuting attorney and any notes, memoranda, or other records made by such victim assistance personnel of such communication shall be considered attorney work product of the prosecuting attorney and not subject to disclosure except where such disclosure is required by law. Such work product shall be subject to other exceptions that apply to attorney work product generally. (Code 1981, § 17-17-9.1, enacted by Ga. L. 2010, p. 214, § 13/HB 567.)

Effective date. — This Code section became effective July 1, 2010.

Cross references. — Confidentiality of certain communications, § 24-9-21.

17-17-12. Notification to victim of accused's motion for new trial or appeal, release on bail or recognizance, appellate proceedings, and outcome of appeal; notifications regarding death penalty cases; victim's rights retained at new trial or on appeal.

(a) Upon the written request of the victim, the prosecuting attorney shall notify the victim of the following:

- (1) That the accused has filed a motion for new trial, an appeal of his or her conviction, or an extraordinary motion for new trial;
- (2) Whether the accused has been released on bail or other recognizance pending the disposition of the motion or appeal;
- (3) The time and place of any appellate court proceedings relating to the motion or appeal and any changes in the time or place of those proceedings; and
- (4) The result of the motion or appeal.

(b) The Attorney General shall notify the prosecuting attorney of the filing of collateral attacks on convictions of this state which are being defended by the Attorney General.

(b.1) In cases in which the accused is convicted of a capital offense and receives the death penalty, the Attorney General shall:

- (1) Notify the prosecuting attorney and upon the written request of the victim notify the victim of the filing and disposition of all collateral attacks on such conviction which are being defended by the

Attorney General, including, but not limited to, petitions for a writ of habeas corpus, and the time and place of any such proceedings and any changes in the time or place of those proceedings; and

(2) Provide the prosecuting attorney and upon the written request of the victim provide the victim with a report on the status of all pending appeals, collateral attacks, and other litigation concerning such conviction which is being defended by the Attorney General at least every six months until the accused dies or the sentence or conviction is overturned or commuted or otherwise reduced to a sentence other than the death penalty.

(c) In the event the accused is granted a new trial or the conviction is reversed or remanded and the case is returned to the trial court for further proceedings, the victim shall be entitled to request the rights and privileges provided by this chapter. (Code 1981, § 17-17-12, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2002, p. 1093, § 1; Ga. L. 2003, p. 247, § 4; Ga. L. 2010, p. 214, § 14/HB 567.)

The 2010 amendment, effective July 1, 2010, added subsection (b); redesignated former subsection (b) as present subsection (b.1); in the introductory language of subsection (b.1), substituted "In cases" for "Upon the written request of the victim as defined in paragraph (11) of Code Section 17-17-3, in cases", and substituted "the Attorney General shall" for "it shall be the duty of the Attorney General to"; in paragraph (b.1)(1), inserted

"prosecuting attorney and upon the written request of the victim notify the" near the beginning, and added a comma following "Attorney General" near the middle; and inserted "the prosecuting attorney and upon the written request of the victim provide" near the beginning of paragraph (b.1)(2).

Law reviews. — For article, "Criminal Procedure," see 27 Ga. St. U. L. Rev. 29 (2011).

17-17-12.1. Requests to prevent an accused from sending any form of written, text, or electronic communication to the victim's family, or the victim.

(a) As used in this Code section, the term "mail" means any form of written communication, including, but not limited to, letters, cards, postcards, packages, parcels, and e-mail as defined by Code Section 16-9-100, text messaging, and any other form of electronic communication which is knowingly intended to be delivered to or received by a victim, any member of the victim's family, or any member of the victim's household.

(b)(1) A victim shall have the right to request not to receive mail from an inmate who was convicted of committing a criminal offense against such victim or was adjudicated by the juvenile court of having committed a delinquent act or designed felony against such victim.

(2) A victim's right to request not to receive mail from such inmate shall extend to any member of such victim's family or any member of

such victim's household during the term of the sentence imposed or dispositional order for such offense.

(3) As soon as practical following a conviction or adjudication, a victim shall be provided with the instructions for requesting that inmate mail be blocked as provided in subsection (c) of this Code section. If the conviction is from a state or superior court, it shall be the duty of the prosecuting attorney to provide a victim with such instructions. If the adjudication is from the juvenile court, such instructions shall be provided by the juvenile court.

(c) The Department of Corrections and the Department of Juvenile Justice shall develop and provide to the prosecuting attorneys and juvenile courts, respectively, the procedures a victim shall follow in order to block inmate mail. Such procedures may include secure electronic means provided that an alternate, nonelectronic procedure is available for victims without access to a computer. Such departments shall also develop and implement appropriate administrative sanctions which shall be imposed against an inmate violating the provisions of this Code section.

(d) If a victim submits a request to block inmate mail, the Department of Corrections, in the case of an adult, or the Department of Juvenile Justice, in the case of a juvenile, shall:

(1) Notify any other custodial authority having actual custody of the inmate of the names and addresses of such victim and the family or household members denoted by such victim;

(2) Notify the inmate of the request to have mail blocked and advise the inmate that sending mail directly or through any third party to such victim or the family or household members denoted by such victim is prohibited and will result in appropriate sanctions and review of all outgoing mail; and

(3) Institute such procedures to ensure that the inmate cannot send mail directly or through any third party to such victim or the family or household members denoted by such victim.

(e) Any custodial authority having actual custody of an inmate with mail restrictions shall not knowingly forward mail addressed to any person who requests not to receive mail pursuant to this Code section.

(f) The imposition of sanctions by a custodial authority pursuant to this Code section shall not preclude the imposition of any other remedies provided by law, nor shall such sanctions bar prosecution of the inmate for any criminal offense which may have been committed in sending such mail.

(g) Notwithstanding the provisions of Article 4 of Chapter 18 of Title 50, information concerning the names and addresses of a victim, and

the family or household members denoted by such victim, who requests that inmate mail be blocked shall not be open to inspection by or made available to the public and shall not be subject to discovery in any civil or criminal case or administrative proceeding unless the court, after notice and a hearing, makes a finding of fact that such information is material and relevant to the case and that such information is not available from any other source. (Code 1981, § 17-17-12.1, enacted by Ga. L. 2010, p. 214, § 15/HB 567; Ga. L. 2011, p. 752, § 17/HB 142.)

Effective date. — This Code section became effective July 1, 2010.

The 2011 amendment, effective May

13, 2011, part of an Act to revise, modernize, and correct the Code, substituted “ensure” for “insure” in paragraph (d)(3).

CHAPTER 18

WRITTEN STATEMENTS OF INFORMATION TO VICTIMS OF RAPE OR FORCIBLE SODOMY

Sec.	Sec.
17-18-1. Duty of certain officials to offer written statement of information to victims of rape or forcible sodomy.	17-18-2. Information for victims of rape or forcible sodomy.

17-18-1. Duty of certain officials to offer written statement of information to victims of rape or forcible sodomy.

When any employee of the Department of Human Services, Department of Community Health, Department of Public Health, Department of Behavioral Health and Developmental Disabilities, a law enforcement agency, or a court has reason to believe that he or she in the course of official duties is speaking to an adult who is or has been a victim of a violation of Code Section 16-6-1, relating to rape, or Code Section 16-6-2, relating to aggravated sodomy, such employee shall offer or provide such adult a written statement of information for victims of rape or aggravated sodomy. Such written statement shall, at a minimum, include the information set out in Code Section 17-18-2 and may include additional information regarding resources available to victims of sexual assault. Information for victims of rape or aggravated sodomy may be provided in any language. (Code 1981, § 17-18-1, enacted by Ga. L. 1996, p. 1115, § 5; Ga. L. 2009, p. 453, § 1-15/HB 228; Ga. L. 2011, p. 705, § 5-3/HB 214.)

The 2009 amendment, effective July 1, 2009, substituted “Department of Hu-

man Services, Department of Community Health, Department of Behavioral Health

and Developmental Disabilities” for “Department of Human Resources” in the first sentence of this Code section.

The 2011 amendment, effective July 1, 2011, inserted “Department of Public

Health,” in the first sentence of this Code section.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 147 (2011).

17-18-2. Information for victims of rape or forcible sodomy.

The following information in substantially the form set out in this Code section shall be provided to adult victims of rape or aggravated sodomy in accordance with Code Section 17-18-1:

“INFORMATION FOR VICTIMS OF RAPE OR FORCIBLE SODOMY

If you are the victim of rape or forcible sodomy, you have certain rights under the law.

Rape or forcible sodomy by a stranger or a person known to you, including rape or forcible sodomy by a person married to you, is a crime. You can ask the government’s lawyer to prosecute a person who has committed a crime. The government pays the cost of prosecuting for crimes.

If you are the victim of rape or forcible sodomy, you should contact a local police department or other law enforcement agency immediately. A police officer will come to take a report and collect evidence. You should keep any clothing you were wearing at the time of the crime as well as any other evidence such as bed sheets. Officers will take you to the hospital for a medical examination. You should not shower or douche before the examination. The law requires that the Georgia Crime Victims Emergency Fund pay for the medical examination to the extent of the cost for the collection of evidence of the crime.” (Code 1981, § 17-18-2, enacted by Ga. L. 1996, p. 1115, § 5; Ga. L. 2011, p. 214, § 6/HB 503.)

The 2011 amendment, effective July 1, 2011, added quotation marks at the beginning and end of the form; and, in the last paragraph of the form, inserted a comma in the first sentence, and substi-

tuted “Georgia Crime Victims Emergency Fund” for “police department or law enforcement agency investigating the crime” in the middle of the last sentence.

